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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 545.

STANDARD OIL COMPANY and SINCLAIR REFINING COMPANY, *Petitioners*,

vs.

CITY OF MARYSVILLE; L. N. COLE, as Mayor; R. E. LONG, et al., etc., *Respondents*.

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1928. CERTIORARI GRANTED JANUARY 2, 1929. (33,854)

BRIEF ON BEHALF OF PETITIONERS ON THE MERITS.

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STANDARD OIL COMPANY and
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vs.

CITY OF MARYSVILLE; L. N. COLE, as Mayor; R. E. LONG; G. S. BOWMAN; ED. HALL; J. H. REYNOLDS; OSCAR PERRY; W. E. MILLER; E. G. FILBERT and E. C. WEBBER as Councilmen, and EDGAR C. BENNETT as City Attorney, and P. HAYES, as Marshal of said City of Marysville. *Respondents.*

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1928. CERTIORARI GRANTED JANUARY 2, 1929. (33,854)

BRIEF ON BEHALF OF PETITIONERS ON THE MERITS.

The Petitioners, Standard Oil Company and Sinclair Refining Company, respectfully show to this Honorable Court:

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 27 Fed. (2d) 478. Said opinion is set out in full at pages 418-435; Dissenting opinion at pages 436-444 of the Record.

II.

JURISDICTION.

1. The date of the judgment to be reversed is May 28, 1928. (R. 445.) A petition for rehearing was filed on July 26, 1928 (R. 446), and on September 17, 1928, same was denied and stay of mandate granted "for a period of 60 days from and after" September 21, 1928. (R. p. 448.)

2. The jurisdiction of this court to review this case is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938.

On November 16, 1928, Petitioners filed in this court their petition for writ of certiorari herein, (R. 449), which petition was later (on December 10, 1928) duly presented to this Court.

On January 2, 1929, this court entered its order allowing certiorari (R. 449) and this cause is now in this court for hearing on the merits.

III.

CONCISE STATEMENT OF THE CASE.

1. That many years prior to the 8th day of October, 1923, your petitioners, Standard Oil Company and Sinclair Refining Company, each maintained and continuously operated in the City of Marysville, Kansas, two above-ground storage tanks of the capacity of from eleven thousand to twelve thousand gallons each and therein kept and stored gasoline and kerosene. (R. 36, 48, 59, 60.)

2. That on the 8th day of October, 1923, the respondent, the City of Marysville, passed and published its Ordinance Number 350 which, among other things, makes it unlawful to keep or store gasoline and kerosene within the city limits in quantities of ten gallons or more "otherwise than in tanks, barrels or other containers which shall be buried at least three feet underground." (R. 37-39.) The sections of said ordinance (which is set out in full on pages 37-39 of the Record) pertinent here are as follows:

> "Section 1. It shall be unlawful for any person, firm or corporation to keep or store within the corporate limits of the City of Marysville, Kansas, any gasoline, kerosene, distillate, fuel oil, crude oil, or other inflammable or combustible liquid otherwise than in tanks, barrels or other containers which shall be buried at least three feet under ground.
>
> "Sec. 2. Any person, firm or corporation who shall maintain any underground tank-yard, shall keep same fenced securely and shall keep at least six inches of gravel, chat, cinders or other large aggre-

gate over the said area so occupied by tanks, and shall keep and maintain such tank-yard in a clean, orderly manner, free from rubbish, weeds, trash or other inflammable substances.

"Sec. 3. This ordinance shall in no case apply to the storage of any crude oil, distillate or fuel oil in containers of a capacity of 500 gallons or less, but only one such 500 gallon container shall be permitted on each premises, nor, shall it apply to the storage of gasoline, kerosene or naptha in quantities of less than ten gallons, all of which commodities in the quantities mentioned and permitted by this section shall be kept and stored in the manner as now provided by existing ordinance.

. . . . . .

"Sec. 5. Any person, firm or corporation violating any of the provisions of this ordinance shall upon conviction be adjudged to pay a fine of $25.00 for each such violation, and each day that any of the commodities herein referred to are stored in violation of the terms hereof shall constitute a separate and distinct offense hereunder.

"Sec. 6. Any person, firm or corporation now storing any of the commodities herein mentioned in a manner otherwise than that herein provided shall be given until the 10th day of November, 1923, in which to bring themselves within the provisions hereof and comply herewith.

"Sec. 7. This ordinance shall be in force and take effect from and after its publication in the official city paper."

Ordinance No. 237 is, by reference to "existing ordinance", adopted and made a part of Ordinance No. 350, by Sec. 3 thereof. Full copy of Ordinance No. 237 is set out in Record pp. 39-40.

3. That on the 11th day of October, 1924, your petitioners filed in the United States District Court for the District of Kansas separate Amended Bills of Complaint in suits which they had theretofore respectively brought in said court, praying, upon grounds fully set forth in each of said Amended Bills of Complaint (which are set out in full in the Record, beginning on pages 1 and 9 respectively), that said ordinance "be declared and decreed by said court to be arbitrary, unreasonable, discriminatory and void and confiscatory of the plaintiffs' property, and in violation of the plaintiffs' rights under the Constitution and laws of the United States and of the State of Kansas"; and that the defendants and each of them be perpetually restrained and enjoined from enforcing or attempting to enforce said Ordinance Number 350. (R. 9 and 18.)

4. That prior to the date of filing said Amended Bills of Complaint as aforesaid and on the 6th day of October, 1924, an order was entered in said District Court, consolidating said two causes and appointing a Special Master to take the proofs, make findings of fact and conclusions of law and recommend what judgment should be entered therein. (See Order, R. 19.)

5. That the Special Master so appointed thereafter qualified and took the evidence, heard oral arguments and received and considered written briefs by counsel for the respective parties and on January 24, 1925, filed his written report which set forth fully his findings of fact, conclusions of law and recommendations as to the judgment to be rendered. (R. 35-67.) The findings of

the special master and his conclusions of law show that he concluded and found from all the evidence that compliance with Ordinance No. 350, by storing gasoline and kerosene in the quantities stored and used by appellees, instead of accomplishing the purpose for which the ordinance was intended, would increase and not lessen the danger and hazard of such storage, and that said ordinances and each and all of the provisions thereof are arbitrary, capricious, discriminatory, unreasonable and subversive of plaintiffs' rights and void; and he, therefore recommended: (R. 66.)

> "That a decree be entered in said cause in accordance with the foregoing Findings of Fact and Conclusions of Law, declaring and decreeing said Ordinance No. 350 of the City of Marysville, Kansas, to be arbitrary, unreasonable, discriminatory and confiscatory of plaintiffs' property, in violation of plaintiffs' rights under the Constitution and Laws of the United States and the common law, the Constitution and laws of the State of Kansas, and void; that said defendants and each of them be perpetually enjoined and restrained from enforcing or attempting to enforce said ordinance, and that said plaintiffs have and recover from said defendants their costs in said suit."

6. That in due time, respondents, who were appellants below, filed exceptions to practically all of the findings of fact and conclusions of law of the Special Master (R. 68-82) and your petitioners filed an exception to all that portion of Finding No. LXXXI of the report of the Special Master filed herein following the first paragraph thereof, because a part thereof was in conflict with all the evidence and,

"That the evidence upon which the portion of said finding herein excepted to is founded covers individual instances of fires which occurred at points other than the City of Marysville, was incompetent to prove or tend to prove or to disprove any issue in this consolidated case, in that said evidence failed to show that the tanks, equipment, surroundings, conditions and manner of operation were the same or similar to those used in Marysville; and, on the contrary, the evidence affirmatively shows in the case of each fire that the equipment of the tanks at which such fires occurred and the surroundings, method, manner and circumstances under which they, and each of them, were operated were different from those in use in the City of Marysville. And for that reason the evidence thereon was wholly incompetent and was admitted and retained in the record over the repeated and earnest objections of the plaintiffs, the Standard Oil Company and the Sinclair Refining Company, and for the reason that to each ruling of the court admitting such evidence and refusing to strike out the same an exception was preserved by counsel for plaintiffs." (R. 82.)

7. That the District Court, after oral argument and consideration of briefs of the parties, entered its decree (R. 88-91) denying and overruling each of the respondents' said exceptions and sustaining and confirming said report of the Special Master except as to the following portion of said Finding Number LXXXI, which by agreement of the parties was stricken out upon consideration of the exceptions of your petitioners: (R. 83.)

"The McCracken and Greenleaf fires were at tanks of the Sinclair Company, equipped with McDonald Duplex Vents and loose manhole covers, the same or similar to those of the Company at Marysville, and at McCracken the top of the vertical gasoline tank

was blown out and the kerosene tank exploded and was lifted off the foundation and thrown to the ground fifteen feet therefrom."

Thereupon the court ordered that that portion of Finding Number LXXXI excepted to by plaintiffs and not stricken out by agreement of the parties, stand in the record; to which ruling of the court the plaintiffs duly excepted (R. 87-88.)

8. That said District Court by its decree permanently and perpetually restrained and enjoined each of the respondents from enforcing or attempting to enforce said ordinance and from arresting or prosecuting or attempting to arrest or prosecute any agent or employee of petitioners for constructing, maintaining and operating their said tanks above ground in said city for the storage of gasoline and kerosene. (R. 88-91.)

9. That thereafter the respondents perfected their appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, (R. 95-108) and on the 28th day of May, 1928, said Circuit Court of Appeals filed its opinion therein, holding said ordinance to be a legitimate exercise of the police power of said city and therefore valid and reversing the District Court and remanding said cause with direction to dismiss the bills of complaint. (R. 418-435.) In passing upon said cause the Circuit Court of Appeals wholly failed to consider or pass upon appellees' objections to the validity or binding effect of that portion of Finding Number LXXXI which plaintiffs most earnestly urged was by the trial court erroneously permitted to remain in the record because founded wholly

upon incompetent evidence, but failed and refused to give any consideration to appellees' petition for rehearing wherein the attention of the Circuit Court of Appeals was specifically directed to said erroneous finding.

10. That on said 28th day of May, 1928, the Honorable O. L. Phillips, one of the judges who sat upon said Circuit Court of Appeals and heard said cause, filed his dissenting opinion therein, in which he held that said ordinance was not a legitimate exercise of the police power of said city and was for that reason invalid. (R. 436-444.)

11. That thereafter and on the 26th day of July, 1928, your petitioners filed in said United States Circuit Court of Appeals a Petition for Rehearing and also their Motion to Stay Mandate. That on the 17th day of September, 1928, said Petition for Rehearing was by said court denied (R. 446) and an order therein entered staying the issuance of mandate for sixty days from September 21, 1928. (R. 448.)

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the District of Kansas.

2. The Circuit Court of Appeals erred in repudiating and nullifying the report and findings of the Special Master (which were approved by the Trial Court) made on conflicting evidence and which by the Circuit Court of Appeals "must be deemed to be presumptively correct".

3. The Circuit Court of Appeals erred in denying the appellees' petition for rehearing.

V.

REASONS RELIED ON FOR REVERSAL OF THE DECREE OF THE CIRCUIT COURT OF APPEALS.

1. The proper determination of this case is gravely important not only to appellees but to the public, because the Special Master has found (Finding XXVIII, R. 43, Finding XLV, R. 46, Finding LX, R. 50), that the ordinance in question not only failed to effect the end desired, namely: the public safety and welfare, but on the contrary materially increased the dangers and hazards to the public, and *his findings are supported by an abundance of most competent and trustworthy evidence from witnesses whose long practical experience and knowledge of the business qualified them above all other witnesses called*

to state the scientific truth; these findings have been approved by the trial court who acted as Chancellor in this case. (R. 89.) Such findings of the Special Master being fully sustained by the evidence, as hereinafter shown, when approved by the Chancellor, were in law conclusive of the facts found and binding upon the Circuit Court of Appeals, but notwithstanding this rule of law the majority opinion of said court not only rejected the approved findings of the Master but undertook to analyze and, in our view, did arbitrarily analyze and misinterpret the evidence and thereon the two members of said court who rendered the majority opinion substituted their judgment for the approved findings of the Master. Indeed, the appellate court in its opinion completely rejected the approved findings of the Master on the sole ground that "the expert testimony of chemists and fire and water chiefs was conflicting (R. 433); and thereon sets aside and nullifies all of the material findings of the Master, and then adds:

> "The most that can be said in favor of the finding of danger in this respect is that it is a debatable question." (R. 434.)

In other words, the Circuit Court of Appeals constitutes itself the sole and exclusive judge of the facts and its entire opinion is based upon its own interpretation of the evidence upon theories and opinions entertained by the majority members of the court relative to its weight and value rather than upon a correct analysis of the evidence and the approved findings of the Master.

Your Petitioners submit that the errors of the Circuit Court of Appeals should be corrected by this Honorable Court:

(a) Because the rule of law declared by the Supreme Court of the State of Kansas in Cities Service Company v. City of Marysville, 117 Kans. 514, involving the validity of this same ordinance, and in which it was held that the validity of the ordinance depended upon the facts established in that particular case and the court said: "The ordinance is therefore open to attack, not only upon the ground of unconstitutionality, but also upon that of being unreasonable in the circumstances in which its enforcement is undertaken," is violated by the opinion of the Circuit Court of Appeals.

(b) Because the uniform rule of law established by decisions of both Federal and State courts, including those of this Honorable Court, is substantially the same as that announced in the Kansas case last referred to, i. e. that whether any such ordinance should be held upon the one hand to be arbitrary, unreasonable and void, or, on the other hand, held to be a legitimate exercise of police power, depends upon the particular facts established in each case. (117 Kansas supra)

(c) Because the usual course of procedure and the uniform rule of law to the effect that findings of fact of a Special Master made upon conflicting testimony, approved by the Chancellor, shall be upheld, were, without any warrant or justification, rejected by the opinion of the Circuit Court of Appeals in this case.

(d) Because the decision of the Circuit Court of Appeals holds in effect that it is as safe to store gasoline and kerosene in large quantities three feet under the ground as it is to leave them above ground where they are subject to daily inspection and repair,

and because said decision is in that respect, as the evidence in the record abundantly shows, in conflict with the best judgment and experience of a vast majority of the men who have spent their adult lives in handling petroleum products, and is contrary to the usage and custom of the oil industry and is inimical to the safety and best interests of the public.

(e) Because this case is of unusual importance in that it involves the public safety of substantially every community in the United States. The natural tendency, in the event that the decision of the Circuit Court of Appeals is permitted to stand as the law of the land, will be that cities of Kansas and of the United States wherein gasoline and kerosene are stored in large quantities (and that of course includes most of them) will enact ordinances of similar purport and effect.

(f) Because city officials and individual citizens know generally that gasoline and kerosene at times emit explosive vapors and being unfamiliar with the methods available and now universally in use for the safe storage of such liquids in large quantities above ground, are influenced by the general belief that underground storage thereof will lessen the danger incident thereto, and oppose above ground storage in centers of population; whereas, it was established and the Master found in this case upon overwhelming evidence practically undisputed by any person of experience in the business, that the storage of large quantities of gasoline and kerosene in underground tanks which cannot be inspected, leaks discovered or the tanks readily repaired, greatly increases public and private hazard, and if the judgment in this case is permitted to stand the public and private safety will be impaired thereby.

2. The decree of the Circuit Court of Appeals should be reversed because the evidence and the findings of the Master show that said ordinance is generally discriminatory and unreasonable.

3. The decree of the Circuit Court of Appeals should be reversed for the reason that the opinion of said Court is based largely upon that portion of Finding LXXXI which was permitted by the Master and the trial court to remain in the record over repeated objections and exceptions of appellees relative to other fires, said objections being upon the ground that the evidence supporting said portion of Finding LXXXI was incompetent and inadmissible and that the Master erred in admitting such evidence and that the trial court erred in overruling appellees' exceptions to said finding, as stated in paragraph 6 under the heading "Concise Statement of the Case," this brief pages 6-7. That said finding is unsupported by any competent evidence and it was error for the Circuit Court of Appeals to consider said finding or to base its opinion in whole or in part thereon; and because thereof the Circuit Court of Appeals erred in refusing to sustain plaintiffs' petition for rehearing based thereon.

VI.

ARGUMENT.

The "Specifications of Error" will be presented in the order above set out, as follows:

Specification of Error No. 1.

"The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the District of Kansas."

Certain facts are conclusively established by common knowledge. They need no supporting testimony from experts or other witnesses. Applying this universally recognized rule to Ordinance No. 350, herein questioned, its unreasonableness and absurdity are conclusively established by the common knowledge that gasoline and kerosene are safely stored and used in densely populated centers in above ground containers of more than *ten gallons*, not only throughout this country but throughout the world. Every person who travels sees large gasoline and kerosene storage tanks above ground in every city, village and hamlet in the land, in close proximity to dwellings, lumber yards, factories, mills and buildings of every kind. It is common knowledge founded upon the observation of all men that gasoline and kerosene, *in large quantities*, are seldom if ever stored underground. The obvious reason for this universal practice in and out of the industry is that above ground storage tanks can be readily policed, inspected, preserved, painted and leaky places therein repaired and made safe; while under-

ground storage tanks cannot be policed, inspected, preserved, painted, repaired or made safe, because they are buried in the earth beyond the sight of human eye and beyond the touch and care of human hands. There such buried tanks would lie necessarily uninspected and uncared for, to leak, rot and disintegrate until their contents would have no other container than the earth itself, which, even in Marysville, Kansas, would be a leaky jug that would disclose conditions only by disaster.

These facts are self evident and need no supporting testimony; yet there is in the record in this case abundant testimony from witnesses schooled and experienced in the business, stating and emphasizing these facts which are a part of the common knowledge of all mankind. *The findings of the Master and the judgment of the trial court are therefore sustained not alone by facts which are within the common knowledge of all mankind but by the positive testimony of numerous witnesses best qualified to know.* The Circuit Court of Appeals therefore erred in reversing the judgment of the trial court.

The unreasonableness and absurdity of the ordinance here in question are further shown in that:

(a) It prohibits the keeping of more than ten gallons of gasoline above ground on any one premises within the city of Marysville, Kansas, without reference to the place kept, the manner of keeping, or proximity to persons or property to be injured.

(b) Under the provisions of Ordinance No. 350 (R. 37-39) all persons, firms and corporations are absolutely prohibited from keeping or storing more than ten gallons

of gasoline or kerosene above ground at any place within the city of Marysville, and Section 1 of Ordinance No. 237, which is by reference made a part of Ordinance No. 350, absolutely prohibits any person from keeping more than five gallons of gasoline, fuel oil or motor spirits in any one container and prohibits the keeping of more than two such containers on any premises in the City of Marysville. (R. 39.)

(c) The evidence shows that there are many large vacant tracts of land within the City of Marysville; that one of these tracts is a corn field, containing 60.08 acres. See testimony of C. F. Travelute, Mayor of the City of Marysville, R. 200-207; also Map, R. 110.

(d) Under the provisions of this unreasonable, arbitrary and absurd ordinance, appellees could not move their tanks from the present locations to the center of the sixty-acre corn field described above and maintain them there above ground without violating this ordinance and being subject to the severe penalties thereof, although all men know that neither persons nor property would be in the slightest degree endangered or injured thereby.

(e) Under the provisions of this ordinance, every filling station in the City of Marysville with elevated glass containers for filling automobile tanks offends and violates the provisions of this unreasonable, arbitrary and absurd ordinance.

(f) Under the provisions of this ordinance, every person storing or keeping an automobile in his own garage, with a gasoline tank containing more than five gallons of gasoline, or with two tanks whose aggregate contents

exceed ten gallons, offends and violates this unreasonable, arbitrary and absurd ordinance.

(g) Under the provisions of this arbitrary, unreasonable and absurd ordinance, the proprietors of all garages in the City of Marysville are made criminals and subject to the heavy penalties prescribed. (Findings XLII, R. 46 and LXVII, R. 57.)

(h) Under the provisions of this arbitrary, unreasonable and absurd ordinance the keeping and transportation of gasoline and kerosene on wagons or trucks which have any container over five gallons, or more than two containers whose contents aggregate more than ten gallons, are criminal and the owners and operators of such tanks or wagons are subject to the heavy penalties of the ordinance. This is also true of all railroad tank cars in which gasoline or kerosene is transported or kept for delivery within said city and the owners and operators of such cars are likewise subject to the penalties of the ordinance.

(i) Under the terms of this ordinance if the opinion of the Eighth Circuit Court of Appeals is permitted to stand, and the ordinance becomes effective, it must be enforced *without discrimination*, not only against the appellees in this case, but also against all citizens of the City of Marysville having automobile tanks which offend the ordinance, including the city officials (Evidence of F. E. Hayes, Jr., County Surveyor and Civil Engineer, R. 111-113) who passed and will have to enforce the unreasonable provisions of their own legislation. Indeed, the heavy penalties of the ordinance will have to be

enforced against all citizens of Marysville who have violated its absurd provisions, from the time of its passage to the date of its enforcement, except appellees in this case who have been in good faith contesting its validity.

(j) The ordinance in question is void for the further reason that it is discriminatory for all the reasons stated in the Master's findings Numbers XXXVIII, R. 45; XXXIX, R. 45; XL, R. 45, XLIII, R. 46; LXIV, R. 57; LXV, R. 57; LXVIII, R. 58; LXXV, R. 60-61; LXXVII, R. 61.

For all the reasons stated under your petitioners' first Specification of Error, the Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the District of Kansas, and we urge that such error should be corrected, and that a decree be entered by this Honorable Court reversing and setting aside the decree of the Circuit Court of Appeals, and affirming the decree of the trial court herein.

Specification of Error No. 2.

"The Circuit Court of Appeals erred in repudiating and nullifying the report and findings of the Special Master (which were approved by the Trial Court) made on conflicting evidence and which by the Circuit Court of Appeals 'must be deemed to be presumptively correct'."

THE REASONABLENESS OR UNREASONABLENESS OF AN ORDINANCE OR LAW MUST BE DETERMINED BY THE FACTS OF EACH PARTICULAR CASE.

The decision sought to be reviewed is in conflict with decisions of the Supreme Court of the State of Kansas, of the lower Federal Courts, and of this Honorable Court in that it ignores and is repugnant to the universally accepted rule of law, namely:

> *That the reasonableness or unreasonableness of an ordinance or statute depends upon and must be determined by the facts of each particular case in which the ordinance or statute is questioned.*

Whether the ordinance involved in the case at bar can be determined to be arbitrary and unreasonable on the one hand or a reasonable and valid exercise of the legislative power on the other hand, can be decided only upon the facts of the particular case. This question in no way involves the power generally of the governing body of a city under the laws of a state to pass ordinances regulating the storage of gasoline, kerosene, etc. The sole question before the Circuit Court of Appeals was:

> Did the ordinance of the City of Marysville, Kansas, requiring the burying of large storage tanks, constitute an arbitrary and unreasonable exercise of the general power granted when applied to the property of the Standard and the Sinclair Oil Companies in their particular locations, or at any other location within the City of Marysville?

Such being the question, the reasonableness or unreasonableness of the ordinance could only be determined by evidence relevant to the property of said oil companies keeping and storing gasoline within the City of Marysville. It is, therefore, necessary that the entire matter be determined by the particular facts as disclosed by the evidence in the case. Such evidence was presented to the Special Master and at the conclusion thereof the Master found after hearing the testimony of numerous witnesses, as a fact: (Finding XLV, R. 46.)

> "That it is more dangerous from the standpoint of public safety to keep and store gasoline or kerosene in quantities of ten thousand gallons or more under the ground than it is to store the same quantities thereof above ground."

This finding was confirmed by the trial court but, notwithstanding the finding and confirmation, the Circuit Court of Appeals, by the majority opinion, wholly ignored this finding of the Special Master who had heard all of the evidence establishing the fact found, and upheld the ordinance in the following language (R. 434):

> "Believing that greater danger will result from under ground storage, he has, in large measure, substituted his own for that of the controlling legislative judgment upon facts fairly debatable and subject to reasonable differences of opinion. Furthermore, in his resume he has found that the greater number of the dangers incidental to the storage of gasoline and kerosene are removed by placing large containers under ground. Whether these outweigh those accruing from underground storage is certainly debatable, and if so, the legislative judgment must prevail."

The majority opinion proceeds on the erroneous premise that, merely because there was conflicting evidence there is a conclusive presumption that:

> "The facts were fairly debatable and subject to reasonable differences of opinion."

This, we respectfully submit, constituted error on the part of the Circuit Court of Appeals. If this were the rule, then no ordinance could ever be declared unreasonable or invalid in a contested case for if the city made any attempt to have the ordinance sustained, then it would certainly introduce evidence contrary to that produced by the party attacking the validity of the ordinance.

All of the above is fully sustained by the language of the Supreme Court of the State of Kansas in the case of Cities Service Company vs. City of Marysville, 117 Kansas, 514, l. c. 515. In speaking of this particular ordinance, the Court said:

> "The ordinance is therefore open to attack not only upon the ground of unconstitutionality, but also upon that of being unreasonable in the circumstances in which its enforcement is undertaken."

The majority opinion of the Circuit Court of Appeals erroneously assumes that the Supreme Court of the State of Kansas, in the Cities Service Case, largely disposed of the questions in the case at bar. If such was the case, the majority opinion is wholly in error for in the syllabus in the Cities Service Case, the Court used the following language:

> "An ordinance forbidding the storage of such fluids, (except in small quantities) otherwise than in tanks buried at least three feet underground is not invalid on its face, and one who attacks it as unreasonable as applied to a particular state of facts has the burden of overcoming strong presumptions in favor of its validity; *and it is held that in the present case such presumptions were not overcome.*"

In the case at bar the Special Master, after hearing the evidence relative to the particular facts in this case, has found that the presumption in favor of the ordinance has been overcome by competent evidence and such finding was approved by the trial court. Thus, while the Court in the Cities Service Case sustained the validity of the ordinance, it did so solely upon the evidence in the record before it, which was wholly different from the evidence in the record in this case, upon which the Special Master in this case found the same ordinance actually increased the dangers to the public and was an arbitrary and an unreasonable exercise of the police power. The Circuit Court of Appeals did not have before it any evidence submitted in the Cities Service Case. Let us assume that no evidence had been introduced in the Cities Service Case by the oil company and that the case had been submitted upon the pleadings. Certainly, the decision of the Kansas Supreme Court would have upheld the ordinance. But this could in no way control a situation in which abundant evidence was introduced to establish the unreasonable and arbitrary character of the ordinance and the Kansas Supreme Court specifically recognized such fact in the syllabus in the Cities Service Case, when it used the following language:

> "And it is held that in the present case such presumptions were not overcome."

Therefore, notwithstanding the results reached by the Kansas Supreme Court, its decision thoroughly recognizes the rule that the validity of an ordinance depends upon the facts of each particular case. The majority opinion of the Eighth Circuit Court of Appeals in this case, in fact, though probably unconsciously, recognizes the above rule, for it cites the case of Whittemore vs. Baxter Laundry Company, 148 N. W., 437, 52 L. R. A. (N. S.) 930 (R. 422), in which case the syllabus not there quoted, reads as follows:

> "It is a nuisance to store 20,000 gallons of gasoline in underground tanks within a few feet of a private dwelling, although every precaution that human ingenuity has conceived has been used in the construction of the tanks."

We call attention to the inconsistency of the majority opinion for it upholds an ordinance compelling tanks to be buried under ground in Marysville, Kansas, and in support thereof cites a case in which such underground storage was held to be a nuisance. Why? Because under the particular facts in the case, the *underground* storage was in such close proximity to a particular house that it constituted a nuisance because of the dangers incident thereto.

See also City of Dayton, Ohio, vs. City Railway Company, 16 Fed. (2d) 401, (Sixth Circuit). In that case the court had under consideration the validity of an ordinance passed by the City of Dayton requiring street cars

to be operated by both a conductor and motorman. The City Railway contended that the ordinance deprived it of its property without due process of law, and further contended that one-man cars are as safe as two-men cars. The fourth paragraph of the syllabus reads:

> "Whether ordinance requiring street cars to be operated by conductor and motorman is reasonably adapted to protect public safety, or is arbitrary, depends on facts of each case."

The portion of the opinion in support of the quoted paragraph of the syllabus is as follows: (l. c. 403.)

> "Thus the sole question, upon this branch of the case, is whether the ordinance of 1923 was a valid exercise of police power; and since no claim is made that any police power is involved, save that concerning the public safety, the specific inquiry is whether the ordinance of 1923 may be considered as reasonably adapted to promote the safety of the public in Dayton. Upon this subject the opinion of the Supreme Court in Sullivan v. Shreveport, 251 U. S. 169, 40 S. Ct. 102, 64 L. Ed. 205, teaches that it depends upon the facts of each case whether the adoption of such an ordinance can be said to be, upon the one hand, arbitrary, or, on the other, to be within the limits of the legislative power on the subject.
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> . . . . . .
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> "It must be noted that the question as to the safety of these one-man cars is not an absolute one. To show merely that there had been accidents and injuries in their use is only to cover part of the question. There is necessarily involved a comparison between the two-men type and the one-man type, because accidents with either are practically inevitable. The criterion must be whether there was reasonable ground to conclude that the cars forbidden by the

> new ordinance were substantially more dangerous to the public than the old cars, a return to which was directed."

See also Weaver v. Palmer Bros., 270 U. S. 402. The question in controversy in that case and the rule of law applied thereto, is distinctly set forth in the opinion at page 410, as follows:

> "The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause of the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. Penna. Coal Co. v. Mahon, 260 U. S. 393, 413. Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See Minnesota Rate Cases, 230 U. S. 352, 452."

The above decisions are the last expressions of these respective courts that we have been able to find upon the proposition under discussion. These decisions unmistakably establish the rule that whether the adoption of such an ordinance as is involved in this case, can be said to be arbitrary, or on the other hand within the legitimate police power on the subject, must necessarily depend upon the facts of each particular case. There is another equally well established rule of law, which should not be overlooked in this discussion, and that is, that the validity of the ordinance in question depends upon whether or

not its provisions if complied with will actually promote or tend to promote public safety by decreasing the dangers incident to the storage of kerosene and gasoline. *Dayton v. City Railway Co., supra;* 19 R. C. L. 805, Sec. 112; 43 C. J. 227-228.

Measured by the foregoing rules, there is necessarily involved in this case a comparison between above-ground and underground storage of kerosene and gasoline in large quantities. That comparison was made by the numerous witnesses of all of the parties in this case, and the Special Master, who took the testimony and saw and heard the witnesses, on conflicting evidence resolved the question in favor of the above-ground method. (R. 46.)

Petitioners do not understand the "fairly debatable" rule to mean that there must be no conflict in the evidence, but rather that it is sufficient to overcome the presumption of validity if the unreasonableness of an ordinance is established by clear and satisfactory proof. Otherwise, it would do violence to the "due process" clause of the Fourteenth Amendment, and other constitutional guarantees, because it is almost impossible to conceive of any legislative enactment upon which the opinions of individuals will not, as to the merits thereof, differ. It should not be overlooked in this case that your petitioners not only contended that this ordinance did not tend to promote the public safety, the proof of which contention would, under all of the authorities, be sufficient to overcome the presumption of validity (Lawton v. Steele, 152 U. S. 133; Meyer v. Neb., 262 U. S. 390; Burns Baking Co. v. Bryan, 264 U. S. 504); but your

petitioners contended that compliance with the provisions would actually increase the public danger, and this contention was by the Master, upon conflicting testimony sustained. (Findings XXVIII, R. 43, and LX, R. 50.) Such being the status of the record in this case, we earnestly urge that the facts concerning the relative merits of underground and aboveground storage cannot be said to be "fairly debatable", but on the other hand, it must be held that the petitioners assumed and successfully sustained the burden of proof and established the unreasonableness of the ordinance by clear and satisfactory proof. Therefore the application by the Circuit Court of Appeals of the "fairly debatable" rule was not only erroneous but is repugnant to the universally accepted rule, established by this court and followed by the Supreme Court of the State of Kansas, to the effect that the validity of an ordinance depends upon the particular facts in each case.

THE CONCLUSIONS, FINDINGS AND RECOMMENDATIONS OF THE MASTER, WHICH WERE APPROVED AND CONFIRMED BY THE TRIAL COURT, ARE PRESUMED TO BE CORRECT, AND THERE IS NOTHING IN THIS CASE TO REBUT THAT PRESUMPTION OR TO JUSTIFY THE ACTION OF THE CIRCUIT COURT OF APPEALS IN REJECTING AND NULLIFYING THE MASTER'S FINDINGS.

The Master definitely found that it was more dangerous from the public safety standpoint to store kerosene and gasoline in quantities of 10,000 gallons or more underground than to store the same above ground (R. 46), and that underground storage as contemplated by the ordinance would be attended with greater hazards to the public safety than would the above ground storage thereof (R. 43), and as a conclusion of law said:

> "That Ordinance Number 350 of the defendant, the City of Marysville, is arbitrary, capricious, discriminatory, unreasonable and subversive of the rights of plaintiffs, and void." (R. 66.)

And he recommended (R. 66)

> ". . . that a decree be entered in said cause in accordance with the foregoing findings of fact and conclusions of law, declaring and decreeing said Ordinance Number 350 of the City of Marysville, Kansas, to be arbitrary, unreasonable, discriminatory and confiscatory of plaintiffs' property, in violation of plaintiffs' rights under the Constitution and laws of the United States and the common law, the Constitution and the laws of the State of Kansas, and void; that said defendants and each of them be perpetually enjoined and restrained from enforcing or attempting to enforce said ordinance, and that said

plaintiffs have and recover from said defendants their costs in said suit."

All of which, after being carefully considered upon elaborate exceptions, oral arguments and written briefs filed by defendants, were reviewed and confirmed by the Trial Court, which in its memorandum decision thereon said in part (R. 94-95):

"After a long, faithful and arduous hearing and consideration of the proofs and arguments of solicitors for the respective parties the Master arrived at the conclusion the ordinance is as charged by plaintiffs, arbitrary, unreasonable, discriminatory and confiscatory of plaintiffs' property rights guaranteed under the Constitution of the United States by the common law and the Constitution of this State.

"As all of this is found on somewhat conflicting proofs, taken and heard with the witnesses before the Master, who had a better opportunity to judge of their credibility than has this court; and, further, as the many exceptions to the findings of fact made by the Master and taken by defendant cannot be considered save by a reading of the entire proofs, I have contented myself with such a study of the proofs as show the many findings excepted to are supported by ample proofs, and from the findings made by the Master, on the proofs, I am of the opinion no other decree can enter in the consolidated case than that by the Master recommended. Indeed, from the study I have given the question, from all the proofs, I am of the opinion the danger attendant upon gasoline and kerosene kept in large tanks buried underneath the ground, as by the ordinance required, would be much more hazardous to the adjoining property owners and their lives and habitations than like tanks above the ground, as kept by plaintiffs in this case. This arising from the diff-

culty of inspection of underground tanks to discover the escape of the oil or gasoline therefrom, and the greater opportunity of such hidden tanks becoming leaky from corrosion, and other causes."

There is probably no more universally accepted principle of law than the presumption which arises in favor of a finding of a Special Master who takes testimony and sees witnesses, on conflicting evidence, in a suit in equity and which is subsequently reviewed and confirmed by the Chancellor.

In the case of Munn, County Treasurer vs. Des Moines National Bank (and other cases with it consolidated), 18 Fed. (2nd) 269, Eighth Circuit, the first paragraph of the syllabus reads:

"Finding of special master, who takes testimony and sees witnesses on conflicting evidence in suit in equity, and which is subsequently reviewed and confirmed by chancellor is buttressed by very strong legal presumption, and ought not be reversed or modified by appellate court, unless serious or important mistake of fact has been made in consideration of evidence, or controlling error of law committed in application of law to case."

In the course of the opinion, the court, speaking through the late Judge Sanborn, at page 270, said:

"We have carefully read the brief of counsel upon these subjects and have examined the evidence in the record, which contains the testimony of more than 200 witnesses, and we are convinced that there was ample evidence before the master and the court below to sustain their findings and conclusions. The finding of a special master who takes the testimony and sees the witnesses upon conflicting evidence in

a suit in equity, and which is subsequently reviewed and confirmed by the chancellor, is buttressed by a very strong legal presumption, and it ought not to be reversed or modified by an appellate court, unless some serious or important mistake of fact has been made in the consideration of the evidence, or a controlling error of law has been committed in the application of the law to the case. We find neither in this case. Tilghman v. Proctor, 125 U. S. 136, 8 S.Ct. 894, 31 L.Ed. 664; Warren v. Keep, 155 U. S. 265, 267, 15 Sup. Ct. 83, 39 L. Ed. 144; Crawford v. Neal, 144 U. S. 585, 596, 12 S.Ct. 759, 36 L.Ed. 552; Moffatt v. Blake (C. C. A.) 145 F. 40, 41; Coder v. Arts (C. C. A.) 152 F. 943, 946, 15 L. R. A. (N. S.) 372; Boswell Nat. Bank v. Simmons, (C. C. A.) 190 F. 735, 736; Paulus v. Buck Mfg. Co. (C. C. A.) 129 F. 594 597."

In Paulus v. Buck Mfg. Co., 129 Fed. 594, 4th paragraph of the syllabus, as follows:

"Where a chancellor has considered conflicting evidence, and made his findings and decree thereon, they must be *deemed to be presumptively correct* in any appellate court; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed."

In the body of the opinion, page 597, Judge Sanborn forcefully announces this principle of law and cites the following cases supporting the same:

Thallman v. Thomas, 49 C. C. A. 317, 323, 111 Fed. 277, 283; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764;

Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Plow Co. v. Carson, 72 Fed. 387, 388; 18 C. C. A. 606, 607; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65.

The principle of law stated in the above cases is confirmed and announced by this court in the following cases:

Tilghman v. Proctor, 125 U. S. 136, in which the 5th paragraph of the syllabus is:

> "The conclusions of a master in chancery, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside unless there clearly appears to have been error or mistake on his part."

See also:

Kimberly v. Arms, 129 U. S. 512.

Crawford v. Neal, 144 U. S. 585, in which it is held, fourth paragraph syllabus:

> "The findings and conclusions of a master upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, the decree should stand."

Furrer v. Ferris, 145 U. S. 132, in which it is held, syllabus:

> "The findings of a master in chancery, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law or some important mistake has been made in the

evidence, neither of which has taken place in this case."

Indeed, the lower court, in the case at bar, recognized the existence of this principle of law, but failed to apply it to this case. (See opinion, R. p. 434.)

In the case of Manorville Borough, Appellant, v. Flenner, Appellee, 286 Pa. 103-107, in which the facts are very similar to those in the case at Bar, the full opinion of the Supreme Court of Pennsylvania reads as follows:

"Boroughs—Ordinances—Storage of gasoline—Prohibitive ordinance—Act of May 14, 1915, P. L. 312—Legislative power.

1. That which is not an infringement upon the public safety and is not a nuisance, cannot be made one by legislative fiat, and then prohibited.

2. Where a power conferred upon a borough is a general one, it can be exercised only in a reasonable manner.

3. Under Section 22 of Article I, chapter 5, of the Borough Code of May 14, 1915, P. L. 312, 334, which gives boroughs the power 'to prescribe the quantities of inflammable articles that may be kept in one place,' the borough may regulate the storage of gasoline.

4. A borough cannot, however, under the statute, enact an ordinance prohibiting the storage of more than 400 gallons of gasoline within the borough limits, where the court has found as a fact, on proper evidence, that the storage of gasoline in unlimited quantities in properly constructed and equipped tanks, such as were involved in this suit, is not dangerous to life or property.

Argued March 15, 1926. Appeal, No. 42, March T., 1926, by plaintiff, from judgment of Superior Ct., April T., 1926, No. 72, affirming order of Q. S. of Armstrong Co., June T., 1924, No. 1, setting aside summary conviction, in case of Manorville Borough v. Harry Flenner. Before MOSCHZISKER, C. J.,

FRAZIER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, J. J. Affirmed.

Appeal from Superior Court.

Order of quarter sessions affirmed. Plaintiff appealed.

Error assigned was judgment of Superior Court, quoting record.

OPINION BY MR. JUSTICE SHAFFER, April 12, 1926:

The Borough of Manorville passed an ordinance which prohibited the storage of more than four hundred gallons of gasoline within the borough limits. The defendant, Harry Flenner, an employe of the Sterling Oil Company, was arrested and summarily convicted of violating this ordinance. On appeal the quarter sessions held the ordinance unreasonable and he was discharged. The borough appealed to the Superior Court, which affirmed the judgment of the quarter sessions and from that action we have this appeal.

The borough sets up, as its authority for the enactment, the provisions, under 'General Powers' of section 22 of article 1, chapter 5, of the Borough Code of May 14, 1915, P. L. 312, 334, that such municipalities shall have power 'To prohibit the manufacture, sale, or exposure of fireworks or other inflammable or dangerous articles; to prescribe the quantities of inflammable articles that may be kept in one place; and to prescribe such other safeguards as may be necessary.' By appellee, it is argued that, under the ejusdem generis doctrine, this provision of the law does not cover the subject of gasoline; with this we do not agree. It is our conclusion, however, that, under the language quoted, the municipality has power to regulate the storage of dangerous commodities, which admittedly gasoline is, under certain conditions, but, as the power conferred

by the Borough Code is a general one, it can be exercised only in a reasonable manner; Livingston v. Wolf, 136 Pa. 519; Kneedler v. Borough of Norristown, 100 Pa. 368; 28 Cyc. 370; 19 Ruling Case Law, page 805; Dillon on Municipal Corporations, 5th ed., page 943; McQuillan on Municipal Corporations, (1911) vol. 2, section 725. We further conclude that the storage limitation to four hundred gallons, under the safe conditions testified to by defendant's undisputed witnesses and found as facts by the court below, is not such a reasonable regulation. These witnesses, experts in their line, said there is no danger in the storage of gasoline in tanks of the kind set up in the borough. This fact makes the situation here analogous to that before the Supreme Court of the United States in the recent case of Weaver v. Palmer Brothers Co., 46 U. S. Supreme Ct. Rep. 320. In that case, the court had for consideration the act of our legislature (Act of June 14, 1923, P. L. 802) which prohibited the use of shoddy in the making of mattresses, pillows, comfortables, etc. In holding the statute invalid, the court said: 'While (shoddy) is sometimes made from filthy rags, and from other materials that have been exposed to infection, it stands undisputed that all dangers to health may be eliminated by appropriate treatment at low cost. . . . Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained, as a measure to protect health. . . . The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment.'

Summarizing the findings of the trial judge, more fully appearing in the opinion of the Superior Court, and which were not excepted to, it was concluded that

the storage of gasoline in unlimited quantities in properly constructed and equipped tanks such as those erected in plaintiff borough is not dangerous to life or property, and it can be and is stored in large quantities in thickly populated districts without danger, that the storage of the amount of gasoline provided for in the tanks in question, 36,000 gallons, is not dangerous within itself, if properly regulated, and, when properly supervised, the use of such appliances for the storage of gasoline as have here been provided does not create a fire hazard to the traveling public or the inhabitants of plaintiff borough. Under these findings, it could not be determined otherwise than that the ordinance in question is unreasonable. It was conclusively shown that not the amount of gasoline stored, but the manner of its storage, determines the question of danger therefrom and that as here stored in modern scientifically constructed tanks is not dangerous. That which is not an infringement upon the public safety and is not a nuisance, cannot be made one by legislative fiat and then prohibited: Bryan v. City of Chester, 212 Pa. 259, 262.

The judgment is affirmed."

The Circuit Court of Appeals, in the course of its opinion in the case at bar, after commenting upon the Master's findings, said (R. 434):

"Believing that greater danger will result from underground storage, he (the Master) has in large measure, substituted his own for that of the controlling legislative judgment upon facts fairly debatable and subject to reasonable differences of opinion."

Thus the court condemns the Master for "believing", after hearing the conflicting testimony of numerous witnesses, "that greater danger will result from underground storage", and making a finding consistent with his belief. The dissenting opinion of Judge Phillips shows that after he had examined the record his opinion coincided with that of the Master. Was it not the duty of the Master to make such finding as in his judgment the facts warranted? The court speaks of the "controlling legislative judgment". If the legislative judgment is controlling, it is futile to litigate over the validity of any ordinance however arbitrary and unreasonable it may be, and the language of this court in Weaver v. Palmer, supra, that:

> "Legislative determinations expressed or implied are entitled to great weight; *but it is always open to interested parties to show that the legislature has transgressed the limits of its power. . . . invalidity may be shown by things which will be judicially noted . . . . . or by facts established by evidence*",

becomes a jumble of empty and meaningless phrases.

In Lawton v. Steele, 152 U. S. 133, l. c. 137, this court said with respect to the legislative judgment:

> "In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

See also Meyer v. Nebraska, 262 U. S. 390, 400.

In the light of these decisions, we submit that the lower court has misconceived the Master's duties in this case. It has never been contended that the findings of the Special Master here under discussion were not supported by the evidence.

The majority opinion of the Eighth Circuit Court of Appeals, further commenting upon the Master's findings, said (R. 434):

> "Furthermore, in his resume, he has found that the greater number of the dangers incidental to the storage of gasoline and kerosene are removed by placing large containers underground."

This observation by the Circuit Court falls very far short of, and is in conflict with the Master's finding Number XXVIII (R. 43), wherein it was definitely found that underground storage would be attended with hazards that would render it more dangerous to property and persons than above ground storage. By reason of this specific finding and many others of like import, notably among which is finding XLV, herein above set out at page 21, we must, with all due respect for its opinion, conclude that it clearly shows that the Circuit Court of Appeals grievously misinterpreted the Master's controlling findings of fact.

In view of the foregoing analysis, we are compelled to the conclusion that while the Master made neither mistake of fact nor error of law in his report, the Circuit Court committed both mistake of fact and of law and therefore its action in rejecting and nullifying the Master's findings and conclusions was entirely without justification and constitutes reversible error.

ANALYSIS OF EVIDENCE, QUALIFICATION OF WITNESSES, AND LAW APPLICABLE THERETO.

The decision of the Circuit Court of Appeals, holding in effect that underground storage is safer than above ground storage, is in conflict with the judgment and experience of men who have accurate information upon the subject, as disclosed by the evidence of many of these men found in the record. The decision of said court is contrary to said evidence, to the usage and custom of the oil industry in general, is contrary to sound reason, and if permitted to become the law of the land will jeopardize the lives and property of millions of people.

That the storage of kerosene and gasoline is a useful and lawful business, necessary to the demands of modern life is an incontrovertible fact conceded by all. In State, ex rel, vs. Cozad, 113 Kan. 200, the Supreme Court of Kansas held, l. c. 202:

> "It is well settled that courts may take judicial notice of the inflammable and explosive qualities of gasoline and kerosene; that their storage, even in large quantities, does not constitute a nuisance *per se*, and that whether or not they constitute a nuisance depends upon the location of the tanks with reference to other buildings, or the manner in which the tanks are constructed and operated. (29 Cyc. 1177; Great Northern Refining Company v. Lutes, et al., 190 Ky. 451, 227 S. W. 795; Thomas v. Jacobs, 254 Pa., St. 255; Hendrickson v. Standard Oil Co., 126 Md. 577, 585; Helms v. Oil Co., 102 Kan. 164, 169 Pac. 208.)"

In the Cozad case from which the above quotation is taken, the Supreme Court of Kansas reversed a decision of the lower court, enjoining as a public nuisance the erection of tanks for the storage of gasoline and kerosene

at a point in a block almost completely occupied by residences, holding l. c. 202:

> "In this case we may eliminate from our consideration the question of improper operation, for the tanks have not been constructed and the court cannot assume, for the purpose of granting an injunction, that they will be improperly operated."

Other objections similar to those urged in the case at bar were urged against the reversal of the above case but the Court held that such contentions are too inconsequential to be of force and, as above stated, reversed the case.

No accidents, fires or explosions at Marysville tanks since their erection.

In the case at bar, it is found by the Master (Findings 8 to 28 inclusive, and 51 to 55 inclusive, also finding 74) that the above-ground tanks of appellees are properly located, constructed, maintained and operated. Any contention to the contrary would be and is futile and fruitless, for *all of the evidence* shows that the Standard Oil Company's tanks have been properly maintained and operated at their present location, without objection by the City, for more than twenty years prior to the passage of Ordinance No. 350 (see Findings 8, 9 and 10 and Stipulation, R. 287), and that the tanks of the Sinclair Refining Company have been properly maintained and operated at their present location, with express authority of the City (See Findings 51 to 55 inclusive also finding 74, and certified copy of authority (R. 145-149), for more than

fourteen years prior to the passage of Ordinance No. 350; and there has never been a fire, explosion, accident or injury to person or property of any kind or character at or connected with the maintenance and operation of said tanks at their present location during their existence. See Findings 18, 19, 20, 54, 55 and 74, and evidence of Mayor Travelute (Tr. 203) where he says:

> "There has never been any oil fire in the Sinclair grounds. We never had any trouble caused by gasoline or kerosene and oil in that block. THE ORDINANCE WASN'T PASSED BECAUSE OF WHAT HAD HAPPENED. All the houses in the block, and the shed, were there at the time the Sinclair Company bought the property, and the only change in that time is the rebuilding of the Reipen house."

That the storage of gasoline and kerosene in above ground tanks located, equipped, maintained, and operated, as the evidence in this case shows appellees' tanks are and have been located, equipped, maintained and operated in the City of Marysville, is safe and does not imperil the inhabitants and property in the City of Marysville, is established, not alone by the experience of the safe operation of the storage tanks here involved, through the extended periods as shown by the evidence and as found by the Master, but also by the universal experience and practice of the oil industry in the storage of kerosene and gasoline in properly equipped and operated above ground tanks.

Indeed, the Supreme Court of Kansas has held in Julian v. Oil Co., 112 Kan. 671, l. c. 673:

"The sale of gasoline and lubricating oils for motor vehicles has become a public convenience and necessity. Stations and stores for this purpose have become almost as numerous and common as grocery stores, where gasoline was formerly kept and sold. The testimony produced tended to show that there was no greater fire hazard in such an establishment than there is where many other kinds of mercantile business is commonly carried on."

The evidence shows (Testimony of H. A. Lewis, Assistant Manager of Sales for Standard Oil Company, twenty-one and one-half years experience in keeping and storing petroleum products R. 196-199; 353-356) that there is a usual and regular manner recognized and in general use by the oil industry of storing and keeping gasoline and kerosene at distributing stations in large quantities in above ground tanks, and that the Standard Oil Company has 12,201 such storage tanks above ground in its territory—997 of which are in the State of Kansas; and that other oil companies have 2,308 of such stations in Kansas (R. 197); and that (R. 354) the Standard Oil Company in the past five years in its more than twelve thousand tanks had only sixty-six (66) fires and during all of said time had had only one explosion—that at Hays, Kansas. There is no evidence to the contrary.

The Master on this undisputed evidence made the following Findings of Fact (R. 42, 43):

XXII.

"That said plaintiff has and maintains more than twelve thousand tanks similar to its tanks in Marysville and during the five years last past has had therein and thereof sixty-six fires and no more.

XXIII.

"In only one of the sixty-six fires so had during the past five years as aforesaid in or about said plaintiff's said tanks numbering more than twelve thousand, has any such tank exploded, and in only one instance (being the same fire) has the fire from a tank spread to or injured other property or persons.

XXIV.

"That the fire at plaintiff's place of business in Hays, Kansas, in November, 1919, is the only one that said plaintiff has had within five years in the maintenance and operation of more than twelve thousand tanks in which a tank has exploded, or in which fire from a tank has spread to or injured either the property or person of others.

XXV.

"That the tank of said plaintiff which exploded during the fire in Hays, Kansas, November 17, 1910, (error, should be 1919), was equipped with a two-inch McDonald duplex vent, but was not equipped with a manhole vent similar to the manhole vent with which each of the tanks of said plaintiff at Marysville, Kansas, is equipped.

XXVI.

"There is no evidence in this case tending to show that any tank similar in construction, equipment, and manner of operation to those maintained by said plaintiff at Marysville, Kansas, as aforesaid, ever exploded or that fire from any such tank ever spread to or otherwise injured either the property or the safety of others."

In the case of Lyman v. Dale, 262 Mo. 360, the Supreme Court of that State forcefully asserts the well known principle of law that:

> "Courts must not blind themselves to common knowledge."

As said in the Cozad case, supra, l. c. 202:

> " . . . Courts may take judicial notice of the inflammable and explosive qualities of gasoline and kerosene."

They will also take judicial notice from the common knowledge of not only the members of this court, but of all people, that, notwithstanding the inflammable and explosive qualities of gasoline and kerosene, in fact, because thereof, these commodities constitute one of the most valuable gifts of the Creator to mankind. By reason of their inflammable and explosive qualities, they are the greatest and most useful servants of mankind and are daily, hourly and momentarily, when properly handled, safely used in every walk and avocation of life.

Crude oil when taken from the earth is the most dangerous petroleum product known (Finding No. 40, Evidence, R. 128, 139, 160, 161, 185), yet crude oil is hourly and mementarily handled with perfect safety in close proximity to and almost in contact with the raging fires of refineries which outglow and equal the heat and flames of the Inferno. But in these refineries the valuable constituents of crude oil, among which are kerosene and gasoline, are separated for application to the use and service of mankind. By reason of their inflammable and explosive powers kerosene and gasoline furnish the motive power that does the work of the world; they propel the engines of our railroads, which carry annually millions of passengers and freight of untold value with perfect

safety; they propel the vehicles of commerce, pleasure and war on land and on and beneath the seas and through the limitless air; they propel buses, tractors, engines and automobiles with inconceivable power and incomprehensible speed; they drive the engines of mammoth passenger liners through boundless oceans, in storm and in calm, with ease and safety; they heat our homes, they cook our food, they turn darkness into light in the remotest corners of the globe; they have driven more than fifteen million Ford automobiles, and an equal if not greater number of other cars to the uttermost parts of the earth, while the drivers ride in perfect safety immediately over, practically sitting upon tanks containing a larger quantity of these inflammable and explosive materials than is allowed to be stored in one container in the whole city of Marysville. Men, women and children use and handle them daily and momentarily without fear or peril. The gigantic burden of work they do for the use, service and pleasure of mankind is safely performed by these products. Yet it remained for the mayor and councilmen of the City of Marysville, Kansas, in the claimed exercise of their sound discretion, to discover that the universal and long established practice of storing kerosene and gasoline in large quantities in above ground tanks of the character of those in Marysville is wrong, and that unless in that city these tanks are buried three feet underground, and covered with at least six inches of gravel, chats, cinders or other large aggregate, there will be fires and explosions in the City of Marysville, Kansas, bringing disaster to its inhabitants and the complete destruction of its property.

It is this character of capricious, unreasonable and arbitrary legislation by municipal councils which caused the Supreme Court of the State of Kansas to say in Smith v. Hosford, 106 Kan. 363, l. c. 366:

> "IT HAS TWICE BEEN SAID THAT THE TYRANNY OF THE AMERICAN SYSTEM OF GOVERNMENT VERY LARGELY CONSISTS IN THE ACTION OF THE MUNICIPAL AUTHORITIES. (Citing cases.) . . . A GARAGE IS NOT A NUISANCE OF ITSELF, BUT IS BECOMING MORE AND MORE NECESSARY AND PROFITABLE, AND IS A LEGITIMATE AND LUCRATIVE MEANS OF MAKING A LIVING AND ADDING TO ONE'S CAPITAL. WHILE NO DOUBT A CITY MAY REGULATE AND LOOK AFTER THE OPERATION OF THIS AS WELL AS OTHER THINGS WHICH BY AN UNLAWFUL USE MAY BECOME INJURIOUS, IT CANNOT WITHOUT TYRANNY REFUSE A CITIZEN THE RIGHT TO USE HIS PROPERTY IN THIS WAY WHEN PROPERLY MANAGED."

No complaint or criticism by City.

Upon undisputed evidence the master found:

Finding No. XX as follows:

> "That no complaint was ever made of or fault found with the construction, equipment or the manner of operation of said plaintiff's tanks, or either of them."

Finding No. LV as follows:

> "That said tanks were constructed under authority duly granted by the Mayor and Councilmen of the City of Marysville, Kansas, and have been maintained and operated with the full knowledge and con-

sent of said City of Marysville, without complaint or criticism from said city, its officers or agents, and without special regulation, until the passage of the ordinance herein complained of."

These findings show that during all of the period during which appellees herein had maintained and operated their tanks and equipment in the handling and storage of gasoline and kerosene in the City of Marysville, Kansas, no complaint had ever been made, nor any fault found, with the construction, equipment, or manner of operation of their tanks or business.

The evidence supporting this finding is found in the testimony of C. F. Travelute, Mayor. (R. 203.)

Construction, equipment and manner of operation of each of appellees' tanks are standard.

Finding No. XXI reads as follows:

"That the construction of each of said plaintiff's tanks and the equipment and manner of operation thereon are standard and of the kinds and character generally employed by said plaintiff in the conduct of its business at all points other than the city of Marysville."

Finding No. LIII reads as follows:

"That each of said tanks is equipped with proper, sufficient and efficient venting devices, consisting of an improved device known as a 2-inch McDonald Duplex Vent and a manhole eighteen inches in diameter, with an adjustable cover, which, under pressure, automatically forms a vent of sufficient capacity to care for all excess vapors which cannot be taken care of by the McDonald Vent, even under conditions of extreme heat; that said vents were at the time of

the commencement of this action, and long prior thereto were, and are now, kept and maintained in good working order and condition; that the connections, pipes, cutoffs and equipment for filling said storage tanks from tank-cars on adjacent railway tracks, and for removing from said storage tanks the contents thereof, and for filling distribution tank wagons, were at the time of the beginning of this action, had been long prior thereto, and now are, generally recognized as approved, efficient, sufficient and safe equipment for the purposes for which they were intended, have been and are now used; that said storage tanks and all the equipment connected and used therewith were constructed and are maintained and operated in first-class condition, carefully, prudently and safely."

These findings are fully supported by the testimony of S F. Munroe, R. 151; William F. Parli, R. 390-392; C. H. Wagner, R. 116; Plaintiffs' Ex. "R." 392; A. S. Hopkins, R. 412; H. R. Boehmer, R. 294.

No changed condition warranting passage of Ordinance No. 350.

Finding No. XXX reads as follows:

"That there are no changed conditions in the buildings or improvements around the tanks and premises of said plaintiff aforesaid, or in that vicinity, which would warrant or justify that said tanks should be buried as required by said Ordinance No. 350."

Finding No. LXIII reads as follows:

"That there are no changed conditions in the buildings or improvements around said tanks, or in their vicinity, which would warrant or justify the requirements of Ordinance No. 350, that said tanks should be buried."

While the evidence shows that the population of Marysville during the period of the operation of appellees' business in the city of Marysville, has increased from about 2,000 to 4,000, it shows conclusively that there is no changed condition within reach of the fire hazards of the plants of appellees which warrants the passage of Ordinance No. 350, for the protection and safety of the people or property of Marysville, and that there are large tracts of land in Marysville, adjacent to the tanks of the Sinclair and Standard Companies which are wholly unoccupied and unfit for residence purposes.

The above findings are supported by the evidence of C. F. Travelute, Mayor of the City of Marysville, called by the Respondents, who testified as follows (R. 203):

> "I have lived in Marysville ever since the Sinclair Company owned these tanks; I know J. H. Reipen and know he built these Sinclair tanks; the same tanks that are there today. He owned the lot on which they were built. I have been Mayor 3½ years. Have known Block 71 since 1916. The Reipen house was built on the block. It was remodeled—the old house rebuilt. There has not been another residence built there since the Sinclair Company bought it (the property). One shed burned down across the street, on the north side. These houses here were there all the time. The little frame sheds were there; the frame shed that was on the north half of block 71—the west half of the north half—burned down. There has never been any oil fire in the Sinclair grounds. We never had any trouble caused by gasoline or kerosene and oil in that block. *The ordinance wasn't passed because of what had happened.* All the houses in the block, and the shed, were there at the time the Sinclair Company bought the property, and the only change in that time is the rebuilding of the Reipen house.

"*The territory lying southwest of block 71 is unfit for residence purposes.* There are only two houses down to Jackson Street south of block 71, and those are clear across the street. There is quite a large vacant tract there; there are 60.8 acres in that vacant tract in the heart of Marysville. Part of it is on the Blue River. Under the ordinance the company would be prohibited from erecting an oil tank within the limits of the city. There is a vacant tract of 8.61 acres here, not very desirable. I know there is a vacant tract of 5.46 acres right east of the Sinclair Oil Company's plant. There is another vacant territory over here, on the southeast side of the city, of 19.55 acres, unfit for (residence). There is a lagoon or low place in vacant territory southwest (of block 71), all sandy soil, sometimes overflows. In 1903 the territory all around there overflowed.

"The business center of Marysville for a great many years has been on Broadway between Sixth and Twelfth Streets. It has been greatly extended in each direction. There have been no houses built south of the Sinclair station in the last 14 years. The Sinclair and Standard Oil Tanks have been there for a great many years. The Blue Valley switch was, to the best of my judgment, built there about the time these tanks were constructed. The tanks are just as they have been all these years since they were constructed." (R. 204.)

"There is an old stone quarry—a vacant tract—8.44 acres, in the north part of the town, comprising block 40, a little north—running a little north from there, that was used for cutting stone for a number of years and is a hillside and is largely not in a condition where it could be used for anything. The plat shown on the map (Exhibit A) in red, comprising block 37 and designated as containing 19.55 acres is a hillside, and at the bottom of this hill or bluff was the original bed of a creek. That is within the city limits. That is no more the bed of a creek, for the reason that the

creek has been changed and there remains a low place and a very rugged hillside. For that reason it has not been built up. *Under present conditions it is not suitable for residence.* A vacant tract of 5.42 acres southwest from the city park is a part of block 69 and is also part of an original creek bed, and is now pretty low and not in condition to be built upon or occupied. Some of it is now used for truck gardening. The low point is 12 or 15 feet below the railroad track. (R. 205.)

"Out about 18th and Laramie, 18th and Jenkins, some ground is marked as vacant by red around it; that is what is known as the Redman addition to the city, in the extreme northwest corner of the town. That is also true of the property lying alongside of the town, north of North Street." (R. 206.)

See testimony of William F. Parli. (R. 156-157.)

Also testimony of F. E. Hays, County Surveyor of Marshall County in which Marysville is situated. (R. 110-115.) Particularly map (Ex. "A," R. 110) drawn by him and introduced in evidence by petitioners. Of this map he testifies (R. 114):

"I prepared this map last spring (shortly prior to the hearing before the Master) on request of counsel for the company (meaning plaintiffs). . . .

"Everything shown on the map surrounded by red is vacant. If the ownership of the house and two lots was one ownership it was marked improved. Vacant property is marked vacant because there is no house on it. When I made the map there was no building of any sort on the tracts shown on the map as vacant, or rather 'Unimproved'."

See, also, testimony of E. F. Bowman (R. 215):

> "The Standard Oil Company's tanks were there when I came to Marysville. All buildings were there when I came to Marysville, with the exception that the residence in the northwest corner of block 40 was built in 1920, together with an office and garage, and the residence facing south on Walnut street, immediately west of the coal shed has been rebuilt and enlarged. The original residence was there when I came. The Reipen residence has been built over and made larger and the Fenwick Oil Cmpany has constructed its galvanized iron warehouse. The rest of buildings were there when I came to Marysville, except that a barn on the north half of block 71 has been burned down since the map was made."

See, also, testimony of A. J. Brooks (R. 133):

> "The improvements near the Standard Oil Company plant during that time—just an ordinary frame residence now under construction, it may turn out to be stucco outside, but the frame is up there and there have been some minor changes on some old coal houses and I don't know but what they have rebuilt an old section house. To my knowledge there are no other changes. There could be some minor changes, but not anything of any importance within the immediate vicinity of the plant. I think they remodeled a little residence about 105 feet on the west of our plant, two or three years ago. I seen some carpenters there. They commenced the erection of the new residence I speak of about three or four weeks ago. The house is just about under cover."

In the case of Dobbins v. Los Angeles, 195 U. S. 223, the Supreme Court of the United States said, 4th paragraph syllabi:

"A municipal ordinance was adopted in September fixing the limits within which gasworks might be erected. Thereafter a permit was granted for the erection of a plant; in November another ordinance was adopted amending the September ordinance and by which ordinance the territory on which the works were in course of erection and purchased in reliance upon the September ordinance was excluded. *There had been no change in the neighborhood or conditions.. Held*, to be void as against the holder of the permit as an arbitrary and discriminatory exercise of the police power which amounted to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment."

Tank Yards of Petitioners not within fire limits of Marysville.

Finding No. XII reads as follows:

"That the real estate and premises upon which both of said plaintiffs' storage tanks and business are located in the City of Marysville, Kansas, as aforesaid, are not now, and never have been, within the fire limits prescribed by the City of Marysville."

See evidence of E. F. Bowman, City Engineer. (R. 209.)

Also Petitioners' Exhibit "H" (R. 208), where the fire limit is shown by dashed line on the north side of Elm street, running west to its intersection with Sixth street, thence north along the east line of Sixth street. Mr. Bowman testified:

"The south line of the fire limits is the north line of Elm street. That is to the point where Elm street intersects Sixth street, then the fire limits turn north

and the west line of the fire limits and the east side of the fire limits is the west side of 6th street. The fire limits are designated on the map, Ex. "H", (R. 209) by a dashed line and by letters 'Fire Limits'."

Ordinance No. 350 was not passed because of fear or danger of the occurrence of a fire or explosion in Marysville similar to that which occurred at Hays, Kansas, on November 17, 1919.

While it is claimed by respondents that Ordinance No. 350 was passed because of a fire that occurred at Hays, Kansas, on November 17, 1919 (in fear that it might be repeated in Marysville), the evidence shows that Ordinance No. 350 was not passed until the 8th of October, 1923, or three years, ten months, and twenty-one days after the fire and explosion at Hays, Kansas. And a study of the record in this case leads to the inevitable conclusion that all reference to the Hays explosion and the other fires referred to by respondents in their evidence and argument, is an after thought,—an attempt to excuse and justify an arbitrary, unreasonable, discriminatory and absurd ordinance.

Underground Storage of Gasoline and Kerosene in Large Quantities more hazardous than Above Ground Storage.

The court, in sustaining the validity of this ordinance, has thereby in practical effect held that it is less hazardous, from the standpoint of public safety, to store gasoline and kerosene in large containers underground than in similar containers above ground. In so holding, *the court has ignored the expert judgment of men of years*

of training and experience in the oil industry and in scientific research, whose evidence is found in the record, to the effect that the public safety is better subserved by the storage thereof above ground.

Some of these men, who thus testified before the Special Master in this case, with a brief statement of their experience and opportunity for obtaining accurate information upon the subject, are:

First: High class independant chemists possessed of much learning as well as practical experience with petroleum products.

Dr. Roy Cross of Kansas City, Missouri, a scientist of great learning and much experience incident to designing and installing about one hundred refineries for the manufacture and storage of gasoline. His testimony appears in the transcript of record, pp. 122-133, recalled, pp. 375-380*.

An examination thereof will give the Court a clear understanding of the reasons why above ground storage is safer than underground storage of large quantities of kerosene and gasoline.

Second. Men of long and extended experience in the actual storage and handling of gasoline in exceptionally large quantities.

* We call the Court's attention to the fact that the claim was made by respondents in the courts below that Dr. Cross first favored underground storage and then changed his evidence. A reading of Dr. Cross' testimony shows that he misspoke himself and almost immediately corrected his statement before leaving the witness stand, and we submit that respondents' claim of wrongful motive on the part of Dr. Cross is wholly unjustified.

1. H. R. Boehmer, Superintendent of the Sugar Creek Refinery of the Standard Oil Company at Sugar Creek, near Kansas City, Missouri, where forty million gallons of gasoline, kerosene and other petroleum products are stored.

Mr. Boehmer was graduated from the University of Wisconsin in electricity and physics, and also studied chemical engineering. He has had a wide experience in the actual handling and storage of large quantities of gasoline and other petroleum products, and in the storage and refining of crude oil, in and about refineries, tank farms and elsewhere. He has made a special study of the methods of storing petroleum products.

His testimony is found in the transcript of record, pp. 137-143; recalled, pp. 169-172; again recalled, 294-301; again recalled, pp. 392-408.

The testimony of Mr. Boehmer is in every way worthy of examination and serious consideration by the Court, as it is the testimony of a scientist of wide experience who daily supervises the storage and handling of millions of gallons of kerosene and gasoline.

2. A. S. Hopkins, Superintendent of the refinery of the Standard Oil Company at Neodesha, Kansas. He has been engaged in the storage and handling of kerosene and gasoline and other petroleum products in large tanks above ground for twenty-seven years. His refinery has during the past ten years had in storage daily from six to thirty million gallons of gasoline in above ground tanks of a capacity as high as two million five hundred thousand gallons each. The actual experience of this

witness is forceful and convincing. We invite the Court to carefully read and consider his testimony found in the transcript of record at pp. 158-166; recalled, pp. 411-413.

Third. Men of large experience in the installation, inspection, repairing and maintenance of above ground storage tanks of the capacity of the storage tanks involved in this action.

1. A. J. Brooks, who had been for eight years prior to the hearing of this case before the Special Master, Superintendent of Construction and Maintenance for the Standard Oil Company in the northern part of the State of Kansas containing ninety stations (including the City of Marysville) having large above ground storage tanks.

The testimony of Mr. Brooks gives a most vivid description of the extent and method of inspection of above ground storage tanks, the precautions that are taken to avoid leakage and danger from fires and explosions, and gives a convincing comparison of the hazards of above ground and underground storage; and, R. 166, on cross examination, he gave the following evidence:

> "Q. How would you go about burying tanks in Marysville?
> "A. Well, say, I tell you if I was using my own money to put those tanks in at Marysville, I would not put them in.
>
> "Q. Just answer the question?
> "A. I cannot.
>
> "Q. How would you go about complying with the terms of this ordinance?
> "A. We would not do it. I do not think the company would do it."

Mr. Brooks' evidence clearly states the reasons why underground storage is more hazardous than above ground storage. His testimony voices the opinion and experience of the entire industry. We request the Court to carefully read his evidence which is found in the transcript of record, pp. 133-137; recalled, pp. 165-166; again recalled, pp. 380-387.

2. S. F. Munroe, who for five and one-half years immediately preceding the hearing before the Special Master, had been Superintendent of Construction, Maintenance and Equipment of large storage tanks (including those in the City of Marysville) for the Sinclair Refining Company.

Mr. Munroe clearly states in his testimony that the underground is more hazardous than above ground storage, and clearly sets out his reasons therefor. His opinion is based on actual experience and observation and is convincing. We request the Court to read his evidence carefully. It is found in the transcript of record at pp. 150-154.

Fourth. Insurance Engineers.

Mr. James W. Campbell, who has made an extended study of and particularly examined the storage of kerosene and gasoline, not only in refineries but in the fields of the Mid-Continent states, and who is employed by an insurance agency which wrote during the year preceding the giving of his testimony, eighty-one million dollars of insurance on oil property.

Mr. Campbell's testimony relative to the comparative hazards of above ground and underground storage of

kerosene and gasoline in large quantities was based upon knowledge derived not only from study and observation, but actual experience with the inspection of underground storage tanks. He tells of buried tanks in Oklahoma and at Arkansas City, Kansas, which had been abandoned for the storage of oil and used as slop tanks. They had been so eaten away and consumed by the underground acids and elements that they were useless for the storage of petroleum products. We ask the Court to carefully read Mr. Campbell's testimony, which is very convincing. It is found in the transcript of record at pp. 182-192; recalled, pp. 279-281; again recalled, pp. 372-375.

Fifth. State Fire Marshals.

John G. Gamber, Fire Marshal of the State of Illinois, who supervises and regulates the fire hazards of the entire state, including the City of Chicago, and who is a member of the Fire Marshals Association of North America, which consists of the State Fire Marshals of North America, including Canada, of which association Mr. Gamber had been secretary for two years, and president for one year; he was also president of the National Firemens Association for two years, relinquishing that position in May of the year before he testified. He was a member of the International Fire Engineers, and a member of the National Fire Protection Association.

The evidence of Mr. Gamber shows that he has made a wide study of the hazards of the storage of kerosene and gasoline in large quantities; that after his appointment as State Fire Marshal of Illinois, he visited practically all the leading cities of the United States for the purpose

of studying the storage of petroleum products; that prior to this investigation he had had experience with the storage of such products as far back as 1892 or 1893; and founded upon his study and observation, he gave it as his unqualified opinion that the storage of kerosene and gasoline in large quantities underground was more hazardous than the storage of such products in like quantities above ground. He gave his reasons in minute detail therefor and said that he had known of large tanks for the storage of kerosene and gasoline underground leaking with disastrous results. We desire to specifically call the Court's attention to a portion of this witness' testimony as follows, (R. 179-180-181):

> "No, I have never had any experience with fires in above ground storage tanks. To be honest with you, in my eight years experience as fire marshal, we have not had an above ground storage tank fire in Illinois that was brought to my attention and they are supposed to report all fires within seven days after occurrence. I heard of one at Hays, either Hays or Parsons, some little place. (R. 179-180.)
>
> . . . . . .
>
> "I have never been an employee of the Standard Oil Company or the Sinclair Oil Company and I have no arrangement whatever for getting compensation for my testimony here.
>
> "My only interest in the thing is to try to establish a standard of safety throughout the United States that we would look to as a standard which all states would adopt. *I am opposed to underground storage and am discouraging it in Illinois* and I have appeared before the councils of several cities where they had adopted ordinances like this.

"Q. You have ordinances requiring underground storage in the State of Illinois—

"A. We had several and I—

"Mr. Bennett: Now, we object to what he did, as volunteered—

"The Master: Answer.

"A. We had several. They were called to my attention and I appeared before the council and gave them the reasons why underground storage was hazardous and asked them to change it and they have made the changes and are building above ground rather than underground.

. . . . . .

"We have concurrent jurisdiction with cities in Illinois and for that reason I appear and ask them to change their regulations for bulk storage." (R. 180-181.)

Mr. Gamber's testimony is worthy of the most careful consideration. We ask the Court to read it. It is found in the transcript of record, pp. 172-182.

Sixth. Men of experience in handling petroleum products for sale at storage stations like those in Marysville.

1. H. A. Lewis, Assistant Manager of Sales for the Standard Oil Company, had been in the service of the Standard Company for twenty-one and one-half years. Mr. Lewis had had wide experience in the keeping and storing of oil, and gave as his opinion that underground storage was more hazardous than above ground storage; that the usual and regular method of storing large quantities of gasoline and kerosene is in above ground storage tanks. Mr. Lewis gave in detail his reasons for the opinion, discussed in detail leakage and other elements to be

considered in the determination of the hazards of underground and above ground storage.

His testimony shows that the Standard Oil Company has no underground storage tanks; that it has 12,201 above ground storage tanks, 997 of which are in Kansas, and that other companies have 2,308 such stations in Kansas. We request the Court to read Mr. Lewis' testimony carefully. It is found in the transcript of record, pp. 196-199; recalled, pp. 353-356.

2. J. E. Dyer, Manager of the Southwest District of the Sinclair Refining Company, whose testimony is found in the transcript of record at pp. 143-150.

3. H. C. Griffin, Manager of the Standard Oil Company in the Southwest territory, including the eastern one-third of Kansas and the southwest quarter of Missouri, has been in the business twenty-five years.

Mr. Griffin in his testimony gives his opinion that underground storage is more hazardous than above ground storage, and states fully his reasons for such opinion. His testimony is found in the transcript of record at pp. 166-168, recalled, pp. 389-390.

4. C. H. Wagner, Manager of the Standard Oil Company at St. Joseph, Missouri, has charge of a large territory in Kansas and Missouri, including the City of Marysville. He had had an extended experience in the storage and handling of large quantities of kerosene and gasoline. He gave his opinion that underground storage is more hazardous than above ground storage. His testimony is found in the transcript of record, pp. 115-122; recalled, pp. 168-169; again recalled, pp. 199-200; again recalled,

pp. 408-411. We request the Court to read the testimony of Mr. Wagner.

Seventh. Men not employed by either of the petitioners.

W. R. Tasker, Superintendent of the municipal water and light plants at Herington, Kansas, had been engaged in that occupation for twenty to twenty-five years.

Mr. Tasker had had experience with storing gasoline in underground tanks at Norton, Kansas. The tank there had a capacity of approximately 20,000 gallons. After a term of use it became leaky, the gasoline escaped into wells, polluting the city water supply 100 to 150 feet away. The company operating this underground tank was compelled to junk it and to construct an above ground tank.

Mr. Tasker also testified that he had a similar experience at Herington, Kansas, where the buried tank became leaky and polluted domestic wells in the City of Herington, one a thousand or twelve hundred feet away from the storage tank. The underground tank at Herington was maintained by the waterworks company and had to be abandoned. The owners of the wells were given free water from the city supply.

Mr. Tasker's testimony is found in the transcript of record, pp. 282-287.

Some of the reasons stated by the above witnesses are as follows:

Leakage constitutes the greatest hazard of fire and explosions.

The above witnesses, who are among those of the widest experience in the industry, by their evidence show that "leakage presents the big danger" in the storage of gasoline and kerosene in large quantities. See testimony of S. F. Munroe, R. 153, where he says:

> "Leaks are our worst trouble and it is necessary to watch them constantly and take care of them. Our inspection is very rigid. We have a good many men in the field—agents, field supervisors, maintenance and equipment men—and the tanks are constantly inspected by the agents. It is necessary to clean out tanks. It would be impossible to clean them out underground. The tanks at Marysville are vertical tanks and are not practical for underground storage, they would have to be discarded."

And evidence of W. R. Tasker, R. 286.

> "Fumes arising from an underground tank will catch fire. The chief virtue of above ground storage as against underground is ability to discover leaks. I think that the leaks are as a rule the cause of fires and explosions, if exposed to fire. If a tank is closed up and there are no leaks there wouldn't be any fire from the tank itself. A steel tank above ground wouldn't be as bad to catch fire as a wooden structure. The handling of gasoline and fuel oils in a steel tank above ground, where it can be policed and leaks discovered, is a reasonably safe way to handle gasoline and fuel oil."

The evidence of the above witness shows that if it were possible to prevent leakage altogether, fires and explosions would never occur, and hazard to the public inci-

dent to the storage of these products would be reduced to the vanishing point; that the ingenuity of man has never yet devised an instrumentality capable of achieving the greatly to be desired result of preventing leaks altogether. Until this result is obtained it will be necessary for those who handle these products, and those who undertake to regulate the handling thereof, to study their characteristics and store them so that leakage can be most readily detected and stopped. This can be done only by above ground storage. All tanks used for the storage of large quantities of gasoline and kerosene leak, and therefore it is vitally essential to maintain an elaborate and effective system of constantly policing and inspecting the tanks for the discovery of leaks, and for the immediate repair of the leaky points. See testimony of A. J. Brooks, R. 134-135; also pp. 382-383; Dr. Roy Cross, R. 128-129; H. R. Boehmer, R. 137-138 and 296; S. F. Munroe, R. 153; C. H. Wagner, R. 116-117.

Leakage is more likely to occur in tanks underground than in tanks maintained above ground.

The evidence of the above witnesses shows that underground tanks will leak more than above ground tanks on account of conditions fully stated in the evidence, some of which are:

1. *Corrosion, which attacks the metal of the tanks, is more prevalent underground next to the soil, which, itself, contains acids and other elements creating corrosion.* See testimony of Dr. Roy Cross, R. 124, where he said:

> "Corrosion is far greater underground than above ground. . . . The ground is almost always moist and there is oxygen in the water that runs around it and that would cause corrosion."

H. R. Boehmer, R. 138; A. S. Hopkins, R. 159-160; W. E. Brewer, R. 193.

2. *The strain upon the seams and rivets of the tank incident to the installation thereof for use underground is greater than that encountered in the installation of tanks above ground.* See testimony of Dr. Roy Cross, R. 126-127; A. J. Brooks, R. 386-387.

The testimony of Mr. Brooks shows that it is almost impossible to ship and handle one of these large storage tanks and install it for use without causing it to leak at the seams. This occurs from handling before the tank is put in actual use.

3. *A leaking tank cannot be repaired while it is underground; it must first be dug up and brought to the surface.* See evidence of S. F. Munroe, R. 152-153; Dr. Cross, (R. 125) where he said:

There would be more difficulty in reaching an underground tank to repair it. "Above ground storage is easier to repair."

On the same page, Dr. Cross stated that he knew of an underground tank in Oklahoma, whose use was discontinued because of the leakage of the tank. See, also, R. 129, where he said:

> "I have had experience with storage tanks above ground. They frequently leak. Leaks can be arrested and repaired before they become serious."

And again, p. 129:

> "You don't know where leaking gasoline is going when the tank is underground; above ground you can see the leak and stop it. It can be taken care of immediately. Leakage amounting to a gallon from an underground tank could run into a sewer and be dangerous."

There is but one installation of an above ground tank; there are as many installations of an underground tank as there are excavations to repair leaks, and installation inevitably causes leaks. See evidence of A. J. Brooks, R. 382, where he said:

> "I never put up a tank that I can recall in which we did not have some leaks—bound to have them. After we get the tanks in the ultimate location and make the tests we have a boilermaker get on them. Then when we find that the tanks are in good condition we wait two or three or four weeks for the general exposure on the metal and then paint them."

There is no known way by which these tanks can be shipped from the point where they are made and established in the ultimate location without making a leak.

> "I don't believe it is possible to get them on the piers without straining the seams and getting some leaks." (R. 383.)

4. *Underground tanks are liable to develop ruptures and leaks caused by expansion and contraction when on a cold day cold gasoline is introduced into a relatively warm underground tank.* See testimony of Dr. Cross, R. 126-127; H. R. Boehmer, R. 143. A. S. Hopkins, R. 161-162, where he said:

"In an underground tank there is danger of having the tank cracked or seams loosened by change of temperature of the contents. In a large tank there would be quite a strain on the metal if the temperature changed much. A buried tank in the winter time would be warmer than the outside atmosphere above ground. Cold fluid dumped into the tank would cause contraction of the tank that would place quite a strain on the metal; the larger the tank the greater the strain."

5. *Underground tanks are liable to be floated out by water breaking connections and allowing the contents to escape.* See testimony of Dr. Cross, R. 124-130-131; H. R. Boehmer, R. 138; A. J. Brooks testified, R. 165, as follows:

"In 1920 the Missouri River raised and the high water caused the tanks in our A station at Atchison, Kansas, to raise up through the floor of the building. All of the connections were broken and about forty thousand gallons of product ran out and back into the basement. We put guards around immediately and then by means of pipe lines pumped it all into the river."

A. S. Hopkins testified, R. 161:

"I have seen one tank, buried in the ground, flooded out. A year ago our school board put in oil burning equipment in the school buildings and buried a 2000 gallon tank filled with oil. They had been using oil out of this tank for two or three weeks, when one night there was a hard rain and in the morning that tank was about half on top of the ground. It broke off the connection leading to the fires and they lost what oil they had in the tank. It ran around on top of the ground. That might occur just as well with a ten or twenty thousand gallon tank in the ground.

Water is heavier than the tank and its contents and it just floats."

The evidence of C. F. Travelute, Mayor of Marysville, Kansas, showed that all the territory about these tanks was overflowed in 1903.

6. *Leaks from underground tanks cannot readily be discovered.* See testimony of S. F. Munroe, R. 153; H. C. Griffin, R. 167; John G. Gamber, R. 173; W. R. Tasker, R. 283-286; A. S. Hopkins, R. 161.

7. *There is no possibility of cleaning out or inspecting underground tanks.* See testimony of A. J. Brooks, R. 135-136; A. S. Hopkins, R. 159; S. F. Munroe, R. 153.

8. *Accurate measurements in large underground tanks cannot be made.* The evidence of Dr. Cross, R. 130; H. A. Lewis, R. 355; H. C. Griffin, R. 389; C. H. Wagner, R. 410, shows that leakage in underground tanks cannot be detected, and that accurate measurements of the contents of underground tanks cannot be made; that these tanks cannot be installed and kept level; settling of the soil and foundations thereof throws the tanks out of level and this condition cannot be discovered if the tanks are underground; that if the tanks were level, a measuring stick or device would have to be lowered into the tank from the top; that if the tank is not level, or is turned, an accurate measurement cannot be taken. No person can accurately insert a measuring stick without any deviation from the exact perpendicular; that if the tank is turned so that a measuring stick penetrating the top opening is thrown to one side by the tank turning on its axis, an

accurate measurement cannot be made; that an underground tank cannot be accurately measured closer than from ten to one hundred gallons of its actual contents; that it is impossible to procure a measuring stick upon which gasoline will not crawl, and that there is no accurate method of determining the contents of an underground tank.

Leakage from an underground tank is more dangerous than leakage from an above ground tank, because:

(a) It does not evaporate.

(b) We do not know where it goes.

(c) The leak cannot be discovered before actual disaster occurs. See evidence of Dr. Cross, R. 130; H. C. Griffin, R. 167-168; John G. Gamber, R. 172-182; W. R. Tasker, R. 284.

The only witnesses whose testimony was introduced by respondents to controvert the testimony above cited are:

1. Hamilton Perkins Cady. (R. 301-326.)
2. Roy L. Simpson. (R. 330-353.)
3. Nathan G. Burgster. (R. 356-367; recalled, R. 371-373.)
4. J. C. Patrick. (R. 367-371.)
5. G. L. Fenwick. (R. 219-227; recalled, 268-271.)

1. Of these witnesses called by the respondents, those who testified that in their opinion underground storage is the least hazardous, Dr. Cady is of course the outstanding figure. We do not in the least doubt his sincerity or his genuine scholastic standing. He is an interesting and accomplished gentleman who dwelt entertainingly upon many questions of incidental interest, but we unhesitatingly as-

sert that an examination of his evidence stating the reasons for his opinion, and the details of his testimony generally considered, will clearly convince that this splendid man of learning is almost wholly without practical experience in the storage of large quantities of kerosene and gasoline, and is without any practical knowledge of the subject matter of this controversy.

2. Roy L. Simpson, City Manager of Excelsior Springs, Missouri, was the only witness for the defendant who claimed to have had any practical experience or knowledge of this subject. His opinion of the relative hazards of above and under ground storage of these products in large quantities, whatever it may have been, was not directly asserted. Not that there was any apparent hesitancy on his part to express opinions, indeed, he did express himself with vigor and emphasis, if not with convincing power, about several of the less important incidental questions; but as we recall, he did not venture an opinion on the main or fundamental one. We are convinced that the Court will upon reading his testimony, reach the conclusion which the Master evidently reached, that is that Mr. Simpson's opinions are not of great value. Although he was not forty years of age at the time his testimony was given R. 349), he had since leaving college (he never graduated from any department of any college, R. 349), been employed by an almost incredible number of concerns, and at many different kinds of employment (R. 331-332). Although professing knowledge along highly technical lines, he found it necessary to work as a *welder* for a considerable period. The average compensation of a welder about

that time was eighty cents per hour (Ev. H. R. Boehmer, R. 398). His employment as a welder was not in the early part of his experience but was after he had held the most important positions he claimed to have filled. With all his claimed knowledge he did not know which was the more expensive method, welding or riveting tanks (R. 350), athough it is a matter of common knowledge among men of experience in the business that welding is much cheaper than riveting. (See testimony of A. J. Hopkins, R. 412; H. R. Boehmer, R. 397.)

We submit that careful reading of Mr. Simpson's testimony will convince the Court that his testimony on the relative hazards of above and underground storage is not entitled to great weight. That the Master so concluded is shown by his findings quoted above.

3. Nathan G. Burgster, a witness called by appellants, was Superintendent of Schedules of the Western Actuarial Bureau and had experience with and knowldge of statistics upon which insurance rates are based, but he had never been in the oil business, had never gone into the oil fields, or examined and made a study of refineries and storage stations, as had Mr. James W. Campbell, the insurance expert who testified for appellees. In fact, Mr. Burgster was wholly without any practical experience in the industry about which he undertook to give testimony.

4. J. C. Patrick is a Consulting Chemist of Kansas City, Missouri, connected with the Industrial Testing Laboratories of Kansas City, Missouri. Mr. Patrick did not claim to have any practical knowledge of the storing of gasoline or kerosene in large quantities. He gave tes-

timony relative to the value of certain paints and coatings for the protection of buried iron against corrosion, and while he gave an opinion favoring underground storage as compared with above ground storage, his experience in connection therewith is shown to have been with very small quantities of the product. He testified, R. 369:

> "I had some experience with storing very high test gasoline used in laboratory work which was considered very dangerous, it is casing head gasoline."

5. G. L. Fenwick, who, in obedience to Ordinance No. 350, installed underground tanks in the northwest corner of Block 71, was not asked for his opinion as to the comparative hazards of above and underground storage of gasoline in large quantities, but he gave a number of conclusions which touched upon the subject in his testimony, and contradicted practically every other witness on many points on which he claimed knowledge, and thereby discredited his own testimony.

To illustrate: He stated that he could accurately measure the contents of a large underground horizontal tank by means of a measuring stick and he further said that gasoline would not crawl on such measuring stick, because of special paint, R. 220, 224, while the testimony of all other witnesses was that this cannot be done.

Although he admitted that he could not readily tell when a buried tank was leaking, he undertook to tell how he would fix one that was leaking. Speaking of his own tanks he said, R. 222-223:

> "There are three separate lines of pipe from the pump out to each tank. The longest line is 35 feet

from the pump, the middle one about 18 or 20 feet. The average distance of the tanks from the pump house is one-third of 87.5 feet. There are three elbows on one line, two on another. There are 14 connections and 14 chances for leaks. I don't know whether it would be safer from the standpoint of leaks if you had them above ground, where you could see them. If they were above ground you could see the leak and it would be easier to fix. If you had a leak of ten gallons a day the pump would not work. If there was a leak of ten gallons a day it would be 70 gallons at the end of the week. In order to fix a leak in an underground tank you would have to dig up the tank buried in a hole 13 feet deep, with three feet of dirt on top of it. If somebody was taking gasoline out of the tank you couldn't tell whether it was a leak.

. . . . . .

"I never had any experience other than in handling my own pipes and tanks underground. My only knowledge of the comparative value of over ground and underground storage is limited to that experience. *The only* advantage of underground tanks that I can think of is an even temperature."

But later reconsidered and said he really did not know what he would do if one of his tanks sprung a leak. He said (R. 225):

"I don't know what I would do in case the tanks sprung a leak. We have some tanks in Marysville leaking. A prudent business man must figure on that. If my tanks got to leaking I would have to fix them the best way I could, would have to figure out some way."

To demonstrate conclusively his total lack of knowledge of the subjects on which he was talking, he said (R. 223):

"Vapors of gasoline are not heavier than air. They are quite the opposite of that. I don't think vapors that arise from gasoline settle to the ground."

While every person connected with the handling of petroleum products knows that the vapors of gasoline are heavier than air and always settle to the ground. The evidence of every other witness who testified on the subject shows this. In fact, the only thing of which this witness was really certain, and on which he had any definite knowledge, is his experience given in the last paragraph of his testimony, on page 227, of the Transcript, namely:

"I don't claim to be an expert. My testimony is based on my own experience, that is all."

To the evidence of these witnesses we can only apply the universally accepted axiom that, "Where procurable knowledge would have changed the issue, ignorance bears all the vice of guilt."

We believe that the only other witness for the respondents who testified to anything even remotely touching the questions involved under above headings were Alex Henderson, Chief of the Fire Department of Kansas City, whose testimony appears in the Transcript of Record at pp. 356-358; and E. F. Bowman, whose testimony appears in the Transcript of Record at pp. 207-218; recalled pp. 277-278; again recalled pp. 328-330.

An examination of the testimony of these two witnesses will convince that their testimony has little if any application to the questions here presented.

We are convinced that when this Court has carefully examined the conflicting testimony of the witnesses cited above, it will be convinced that the Findings of the Master set out above are fully sustained by the overwhelming weight of the evidence.

Safety of Tanks and Equipment at Marysville, and Hazard Compared with other Buildings and Property.

Finding No. XXXI is:

> "That each of said tanks so operated and maintained by said plaintiff in the City of Marysville and equipped with the venting devices aforesaid is safe from the standpoint of the public safety and does not present a greater fire hazard than would a frame building or a stock of groceries in a frame building at the same location."

This finding is sustained by the evidence of John G. Gamber and James W. Campbell.

Indeed, the finding but reflects a well known fact which has been judicially determined in Julian vs. Oil Company, 112 Kan. 671, in which it is said, l. c. 673:

> "The sale of gasoline and lubricating oils for motor vehicles has become a public conveyance and necessity. Stations and stores for this purpose have become almost as numerous and common as grocery stores where gasoline was formerly kept and sold. The testimony produced tended to show *that there was no greater fire hazard in such an establishment than there is where many other kinds of mercantile business is commonly carried on.*"

Crude Oil more Dangerous than Gasoline and Kerosene.

Finding No. XL is:

> "That crude oil is more dangerous from the standpoint of public safety than is gasoline or kerosene and presents a greater hazard."

Finding No. LXV is:

> "That under the provisions of said Ordinance No. 350 any quantity of crude oil less than 500 gallons may be stored in tanks above ground in any part of the City of Marysville, and that crude oil is, as far as fires and explosions are concerned, as hazardous, or more hazardous, than gasoline."

The above findings are sustained by the evidence of H. R. Boehmer and A. S. Hopkins.

Discrimination.

Finding No. XLIII is:

> "That the provisions of Ordinances No. 237 and 350 permit and authorize a discrimination particularly in favor of those who desire to keep and store crude oil, distillate and fuel oil in quantities less than five hundred gallons above ground and against those who wish to keep and store crude oil, distillate and fuel oil in quantities of 501 gallons or more above ground, and against those who wish to store and keep ten gallons of gasoline, fuel oil or motor spirits on their premises in one container above ground, and against those who wish to keep and store ten gallons or more of gasoline, kerosene or naptha above ground in the City of Marysville."

Finding No. LXVIII is:

> "That the provisions of Ordinances Nos. 237 and 350 permit and authorize a discrimination particularly in favor of those who desire to keep and store crude oil, distillate and fuel oil in quantities of less than 500 gallons above ground, and against those who wish to keep and store crude oil, distillate and fuel oil in quantities of 501 gallons or more above ground, and against those who wish to store and keep more than five gallons of gasoline, fuel oil or motor spirits on their premises in one container above ground, and against those who wish to keep and store ten gallons or more of gasoline, kerosene or naphtha above ground in the City of Marysville."

See Ordinances Nos. 350 and 237, Tr. pp. 37-40.

Ordinances void.

Finding No. XLVII is:

> "That the provisions of Sections 1 and 3 of said Ordinance No. 350 and each and all parts thereof are arbitrary, capricious, discriminatory, unreasonable and subversive of the rights of said plaintiff herein."

Finding No. LXXXVII is:

> "That the provisions of Ordinances Nos. 237 and 350 are arbitrary, capricious, discriminatory, unreasonable and subversive of the rights of the plaintiff, The Sinclair Refining Company, herein."

These findings, together with the conclusions of law and recommendations of the Special Master hereinbefore set out, are supported by abundant evidence found in the record and hereinbefore analyzed.

UNDERGROUND STORAGE CONTRARY TO USAGE IN THE INDUSTRY.

Finding of the Master XXII (R. 42), sustained by undisputed evidence, shows that the Standard Oil Company alone maintains approximately twelve thousand above ground tanks "similar to its tanks in Marysville", and the undisputed evidence, conclusively shows that the universally recognized method and practice of the industry is to store gasoline and kerosene in large quantities above ground. (R. 196-199.)

The dissenting opinion of Judge Phillips graphically states the character of the evidence and its effect as follows: (R. 442-443.)

> "The fact that the witnesses for the appellees base their opinions and conclusions upon knowledge gained through practical and extensive experience, the fact that they gave such cogent reasons for their conclusions, and the fact that the conclusions of the witnesses for the appellants were largely theoretical and not based on practical knowledge and experience, lead me to the conclusion that the evidence on this controverted point clearly and satisfactorily established that the provisions of the ordinance, instead of tending to promote the public safety, tended in the opposite direction, and that compliance therewith would increase, instead of decrease, the hazard from fire and explosion resulting from the storage of gasoline and like substances in large quantities. If this be true, the findings above quoted, made by the Master and confirmed by the trial court, should be adopted by this court.
>
> "If these findings are true, the ordinance in question is not reasonably calculated to accomplish its intended purpose, and is therefore unreasonable and void."

Therefore, we respectfully insist that the fact that there is unanimity of opinion among such men that above ground storage is the safest method known, and that the further fact that the petroleum industry as a whole (which is well known to be progressive) has accepted and adopted that method as best for the storage of large quantities, as the record in this case abundantly shows, is worthy of serious consideration before announcing a rule which it is fair to assume will, if finally upheld, require the industry to proceed contrary to the judgment which it has accumulated throughout the years and store its product in a manner which it believes, and the Master in this case expressly found, is vastly more dangerous to the public than the methods now in general use.

THE DECISION OF THE CIRCUIT COURT IS UNTENABLE IN THE LIGHT OF THE CONTROLLING FACTS IN THE CASE WHICH ARE UNDISPUTED.

The following facts are established by the record in this case without contradiction:

That sooner or later all storage tanks leak, (R. 167, 332, 383, 386); that leakage presents the greatest hazard of fire and explosion (R. 123, 124, 153, 174, 286); that leakage is more likely to occur in tanks underground than above ground (R. 124, 126, 127); that it is impossible to install a tank of large capacity even above ground without straining the seams and thereby causing leaks (R. 153, 382, 383); that the strain upon the seams and rivets of the tanks incident to the installation thereof for use underground is greater than encountered in the installa-

tion of tanks above ground (R. 126, 386, 387, 390, 391); that leaks in underground tanks can neither be discovered (R. 130) nor repaired without taking the tanks out of the ground (R. 123, 153); leaks in tanks above ground can be readily found upon inspection and repaired immediately (R. 129); leaks in underground tanks are far more serious from the standpoint of public safety than leaks in above ground tanks for the reason that leaks in underground tanks cannot be repaired and cannot be discovered until disclosed by disaster. (R. 123, 124, 167, 168, 174, 283.)

The foregoing facts graphically prove the superiority of above ground storage over underground storage from the standpoint of public safety and conclusively show that all tanks used for the storage of large quantities of gasoline and kerosene at some time or other leak; that leakage is the greatest element of danger in the handling of these products, and therefore, it is vitally essential to maintain elaborate and effective systems of policing and inspecting tanks for leaks and repairing them; and most significant of all, that leaks can be readily discovered and repaired in above ground tanks, whereas in underground tanks, they cannot be easily discovered and they cannot be repaired until the tanks are removed from the ground.

These facts condemn the ordinance, justify the report and findings of the Special Master, and emphatically point out the dangerous effect of the action of the Eight Circuit Court of Appeals in placing its stamp of approval upon a legislative enactment which greatly in-

creases the dangers which it was designed to decrease and minimize.

For all the reasons stated under this Second Specification of Error, we submit that the decree of the Circuit Court of Appeals should be reversed.

Specification of Error No. 3.

"The Circuit Court of Appeals erred in denying appellees' petition for rehearing."

Subdivisions I, II, III and IV and the prayer of appellees' petition for rehearing are set out Record pages 442-444 of the transcript of record filed in this Court with petition for certiorari, but they were, by the Clerk of this Court, wholly omitted from the record in reprinted transcript (see p. 446 thereof); and the discussion and quotations from the record, which are a substantial and vital part of said petition for rehearing, were by the Clerk of the Circuit Court of Appeals omitted from the printed record used in that Court, and in their place a line of stars is inserted to show the omission, old Record page 444.

An examination of said petition for rehearing would disclose that the reasons stated therein as grounds for such rehearing have been fully discussed under Specifications of Error numbers 1 and 2, above, with the exception of paragraph I and the last clause of paragraph II of said petition. It follows that the arguments made and the authorities cited under Specifications of Error 1 and 2, above, apply with equal force to the error of the Eighth Circuit Court of Appeals in denying petitioners'

petition for rehearing, and for the sake of brevity said arguments and citations are referred to and will not be here repeated. We will, therefore, under this Specification of Error discuss only the first subdivision of said petition for rehearing and the last clause of the second subdivision thereof, which have been hereinbefore referred to but only partially discussed. They are as follows: (old Record on file with this court pp. 442-444.)

I.

"The opinion of this court holding against the contentions of appellees is based almost wholly upon the consideration of the Master's Finding No. LXXXI, and upon decisions of other courts passing upon cases in which the evidence was wholly different from that presented in the record herein." (Official opinion 27 Fed. (2d) 480.)

"We beg leave to call this Honorable Court's attention to the fact that it wholly overlooked, and failed to pass upon, the validity of the Master's Finding No. LXXXI under the challenges lodged against it by appellees herein, and fairly presented by the record to this court, namely: that that portion of Master's Finding No. LXXXI which still stands in the record, and not stricken out by the trial court, and upon which this court based its opinion, is wholly unsupported by any competent evidence; and appellees submit that proper objections were made to all of the incompetent evidence admitted by the Master upon which said Finding No. LXXXI is based, and due and proper exceptions were preserved in the record, not only to the admission of such evidence, but to said finding made thereon, and to the order of the trial court approving said finding; all of which is disclosed by the record herein."

II.

. . . . . .

"And we submit that this court has entirely overlooked the evidence in the case at bar, and the findings of the Special Master which are supported by an abundance of competent evidence (except Finding No. LXXXI), and which conclusively show that appellees have sustained the burden and by competent evidence overcome the presumption in favor of the validity of the ordinance, and by competent evidence and valid findings of the Master approved by this court, have conclusively established the invalidity of the ordinance."

It is elementary law that evidence of individual instances of fires and explosions at other places than those in question, is not competent to prove what may happen at the place in question, unless it is shown by positive testimony that such other fires and explosions occurred in tanks constructed, operated and equipped in the identical manner, or substantially the same, as those in question. We call the court's attention to the record and to the objections made therein, to the evidence relative to each and every fire and explosion about which evidence was given, and to the fact that the evidence of the City of Marysville failed to show that the tanks where fires and explosions occurred were identically constructed and equipped as those at Marysville, or in substantial similarity thereto; or were operated under similar circumstances and conditions, and in each case proper objections were made to the competency of such evidence, and proper exceptions are preserved in the record to the rulings of the Master admitting such evidence, to said

Finding No. LXXXI, and to the ruling of the trial court approving Finding No. LXXXI based on such incompetent evidence.

Notwithstanding this state of the record, the Eighth Circuit Court of Appeals in its opinion has laid great stress on Finding No. LXXXI, which is based solely upon evidence so erroneously admitted.

The opinion of the Circuit Court of Appeals lays special emphasis upon the explosion which occurred at Hays, Kansas, notwithstanding the undisputed fact that the evidence in the record is that the tanks at Hays were not equipped in the same manner as the tanks at Marysville; were not vented or operated in the same manner.

With all due respect for that court's opinion, we submit that it has wholly failed to take into consideration the competency of such evidence in the trial before the Master, or the validity of Finding No. LXXXI based thereon, or the order of the trial court approving the same, or the objections of petitioners to such rulings and orders and the exceptions reserved thereon.

All evidence presented by respondents relative to the Hays fire and explosion, and to other fires, which resulted in Finding No. LXXXI (R. 62-63), was incompetent and should not have been received by the Master, for the reasons stated in the objections made to the introduction thereof.

These objections were made with persistent repetition, and motions to strike out were made by petitioners in every case, and exceptions taken to the ruling of the Master thereon, and to the ruling of the Court in refus-

ing to strike out the remaining portions of Finding No. LXXXI. The general substance and character of these objections, motions and exceptions were as follows: (R. 229.)

> "Mr. Doran: The Sinclair Oil Company objects to the question and any further inquiry into this alleged fire for the reason that evidence relative thereto is not competent to prove any issue in this case. In other words, the dangerous character of the tanks maintained in Marysville, Kansas, and involved in this suit, if they have any dangerous character, cannot be established by individual instance where tanks caught fire in other places, particularly, since the evidence already discloses that the tanks were equipped and operated in a different manner, the maintenance, equipment and operation was different from that employed by the Sinclair Oil Company at Marysville, and I move (urge) that the testimony is wholly incompetent to establish or defeat any issue in this case.
>
> "The Master: The testimony will be received, subject to the objection. . . .
>
> "Mr. Doran: I want it understood that this objection stands to every question touching this incident about which they are speaking.
>
> "Mr. Evans: The Standard Oil Company makes the same objection and asks for the same understanding.
>
> "Mr. Doran: I would like to have an exception allowed as to the court receiving any evidence of that nature."

Plaintiff again renewed the above objection to each and every question and answer:

> "Mr. Doran: Do I understand the Master? I

understood you to say that our request was overruled, and that request was that the objection I made to the first question stood as to all questions.

"The Master: That is the understanding." (R. 230.)

This further record was made (R. 231):

"Mr. Doran: I have no cross examination. I am standing on my objection, and ask to have each and every answer and question relative to the Robinson fire stricken out, for the reason that the character of the Marysville tanks—the character of the Marysville tanks as being dangerous or otherwise within the police power of the city cannot be proved by testimony relating to fires or specific fires elsewhere, and for the further reason that the manner of the operation, equipment and tanks described by the witness at Robinson is totally different from the management, operation and equipment of the tanks of the Sinclair Oil Company at Marysville, and this being true, this is not competent in any way to prove the character of the tanks at Marysville, and I ask to have this testimony stricken out.

"The Master: Overruled at the present.

"Mr. Doran: Note our exception to that ruling."

Substantially the same objections, motions and exceptions were lodged against the evidence relative to the Hays fire and explosion.

All of said Finding No. LXXXI, except the first paragraph thereof, was excepted to by counsel for petitioners (R. pp. 82-86), and a portion of which was by consent of counsel for respondents stricken out by the Trial Court as erroneous (R. 87-88). Petitioners objected to the remaining portions of said Finding No. LXXXI and filed with

the Trial Court their exceptions thereto, which were fully argued and presented to the Trial Court, and exceptions taken to his ruling refusing to strike out said remaining portions of Finding No. LXXXI excepted to by petitioners, as stated. (See decree R. 89.) The basis of said exception being that the remaining portion of Finding No. LXXXI excepted to by petitioners is not founded upon any competent evidence; and we feel that the Trial Court probably declined to strike out the remaining portion of Finding No. LXXXI excepted to by petitioners, for the reason that the Master specifically found:

Finding No. XXV, R. 43:

> "That the tank of said plaintiff which exploded during the fire in Hays, Kansas, November 17, 1910 (1919), was equipped with a two-inch McDonald duplex vent, but was *not* equipped with a manhole vent similar to the manhole vent with which each of the tanks of said plaintiff at Marysville, Kansas, is equipped."

See evidence of D. P. Sims, (R. 327) as follows:

> "I remember the fire at the Standard Oil plant in Hays, Kansas, on November 17, 1919. The large tank that has been mentioned in the evidence was equipped with a manhole with a cast iron cover perfectly solid. It was near the middle of the tank and at the north end was a McDonald safety vent. The tank was *not* equipped with a manhole vent similar to the one used on plaintiff's Exhibit F. (R. 168.)"

And again, Finding No. XXVI, R. 43:

> "There is no evidence in this case tending to show that any tank similar in construction, equipment, and manner of operation to those maintained by said

plaintiff at Marysville, Kansas, as aforesaid, ever exploded or that fire from any such tank ever spread to or otherwise injured either the property or the safety of others."

And again, Finding No. LXXIV, R. 60:

"That there has never been any fire, accident, or explosion of any kind at or in the tanks or place of business of either the Standard Oil Company or the Sinclair Refining Company or at any similar tanks in said City of Marysville."

The Master further found, Finding No. XVI, R. 41:

"That both of the venting devices with which each of said plaintiff's said tanks in Marysville is equipped as aforesaid are in the top of the tank and they are sufficient to carry off any vapor arising from the liquid contents of the tank even when same is subject to extreme heat."

This finding is sustained by the evidence of Dr. Cross, R. 132; H. R. Boehmer, R. 294, 295, 297, 299, 300; A. S. Hopkins, R. 164, 412; C. H. Wagner, R. 115, 116, 168, 169; S. F. Munroe, R. 150, 151; William F. Parli, R. 390, 392; and petitioners' Exhibits: E., (R. 168,) F., (R. 168,) R., (R. 393.)

The inadmissibility of the evidence relative to the fire and explosion at Hays, Kansas, and fires elsewhere, because of failure of proof that the construction and equipment of the tanks, and management of the business, at Hays and the other fires were the same or similar to the tanks, their construction and equipment, and the management of the business at Marysville, is most clearly shown in the opinion of the Appellate Court of Indiana, in In-

diana Natural Illum. Gas. Co. v. New Hampshire Fire Insurance Co., 53 N. E. 185.

In that case the facts were, that an insurance company sued a gas company to recover demages caused by the burning of a house and barn for which the insurance company was compelled to pay. The insurance company claimed that the fire was caused by the negligence of the gas company in allowing the gas pressure to become too great during the night and causing the overheating of stoves; that thereby the stove in the house in question became overheated, resulting in the burning of the house and contents, for which the insurance company had to pay. Several witnesses were allowed to testify that their stoves became overheated on the night of the fire. In passing upon the admissibility of this testimony, the Indiana court said, l. c. 487:

> "Of the several witnesses who were permitted to testify to the condition in which they found their stoves on the night of the Slattery fire, in no one instance was it shown what character or size of mixer was used, or whether the gas was turned partially off by their respective keys, or whether they were burning the full volume of gas which would flow through their burners uncontrolled by the key, or whether their connecting or distributing pipes were the same, etc. The mere fact that other stoves in other parts of the city, receiving their supply of gas from the same source, were, on the night of the Slattery fire, red hot and dangerous, cannot be legitimately considered as having any bearing upon the question we are considering—at least *until it is first shown that the conditions were the same as those of the Slattery stove.* This exact question was decided by this court in the case of Light Co. v. McCormick,

19 Ind. App. 663, 49 N. E. 1085. Robinson, J., wrote the opinion of the court in that case, in which he collected many authorities; and the conclusion reached is supported by all the adjudicated cases, and the reasoning is so clear and strong that it becomes convincing. We cannot add anything to what was there said, and feel fully justified and contented by citing that case, and the case therein cited, as controlling the question here discussed. *If the conditions as to the stoves of all the witnesses were the same, as compared to the stove of Slattery* (i. e.) if the mixers were the same, and the keys were all turned so as to admit the same supply of gas, and the pipes and connections were the same, then a different question would be presented, and it would rest upon a different principle; but that question is not before us for decision, and we express no opinion. Under these facts, and the rules of evidence established by text writers and the authorities, the evidence complained of was incompetent, and it was error to admit it."

See, also, Continental Life Insurance Company v. Searing, 240 Fed. 653, decided by the Circuit Court of Appeals for the Third Circuit, l. c. 657, 658:

"Another matter remains to be noticed. Evidence was submitted of the disappearance of other persons at Atlantic City. This we think constituted error. Without here discussing each of these cases, and showing how they tended to becloud the issue in this case, we may say that every unexplained disappearance case is of necessity different in some particulars from all others, and none of those so testified to in this case involved any such general, or indeed special, identity with the present case, as in any way threw any pertinent evidential light on the present issue. Their recital to the jury was, in our judgment so misleading and prejudicial to the defendants' case that, if for no other reason, the judgment below should be

reversed, and the cause remanded for further procedure."

Also Hammerschlag Mfg. Co. v. Struthers-Wells Co., 154 Fed. 326, l. c. 330.

Sharpless Separator Co. v. Skinner, U. S. Circuit Court of Appeals, 9th Circuit, 25 Fed. 28, 29.

Albany and Rensselaer Co. v. Lundberg, 121 U. S. 451.

The same rule of law is announced by the Supreme Court of nearly all the states, including Kansas.

It follows from the above record that since there is no competent evidence supporting that portion of Finding No. LXXXI excepted to by your petitioners for reasons given in the transcript, and reserved in the record over the objections and exceptions of petitioners, that portion of Finding No. LXXXI so retained in the record was erroneously relied upon by the Eighth Circuit Court of Appeals to sustain its opinion. It is our theory that the trial court disregarded said Finding No. LXXXI because the record discloses that it was founded upon incompetent evidence.

That court, pages 421, 422 of Rec. after having quoted from Finding No. LXXXI with reference to the fire at Hays, Kansas, mentions the fact that there were other destructive fires at McCracken, Greenleaf and Fort Scott, Kansas.

As hereinbefore stated, it is now, and has always been the contention of petitioners that all evidence with reference to these several fires was erroneously admitted, and we specifically call the court's attention to the following additional objections which were made and noted in the

record at the time this testimony was taken, together with the exceptions preserved, and the ruling of the Master thereon.

Mr. Quinley, a witness called on behalf of the respondents (R. 238-240) testified to the fire at Greenleaf, Kansas, without describing the character of the tanks at which the fire occurred, or giving a detailed description of the safety appliances with which said tanks were equipped, or in any way disclosing a similarity between the tanks and equipment at Greenleaf and those at Marysville. To this testimony the petitioners made the following objection, (R. 238):

> "Mr. Doran: The Sinclair Company objects to the questions asked—the last questions—for the reason that the evidence inquired for doesn't prove or tend to prove any issue in this case, and particularly it is not shown that the manner of operation, equipment, and character of the tanks described by the witness at Greenleaf, Kansas, is the same or similar to the tanks at Marysville, and for that reason the evidence is wholly incompetent, and also the same objection for the Standard.
>
> "The Master: Overruled for the present."
>
> . . . . . .
>
> "Mr. Doran: I would like to have my objection run to all these questions.
>
> "The Master: I don't think it is necessary for you to repeat the same objection again."

The objections are, however, again renewed, and proper exceptions are shown, on page 240 of the transcript of record.

Mr. Harry Frankenstein, a witness called by the respondents, testified (R. 241) with reference to the fire at McCracken, Kansas. His testimony failed to show that there was a similarity between the equipment at McCracken and that at Marysville. To this testimony the petitioners made the following objection, and the Master made the following ruling:

> "Mr. Evans: I want to object to the introduction of any testimony as to the fire at McCracken as incompetent, irrelevant and immaterial, and don't tend to prove or disprove any issue in this case, and for the reason that it hasn't been shown that the equipment and surroundings were similar to the equipment and surroundings and manner of operation at Marysville.
>
> "Mr. Doran: And you can't prove the dangerous character of a particular thing by describing individual instances of occurrences at other places.
>
> "The Master: The testimony will be received subject to the objection."

M. W. Smith, a witness called by the respondents, testified (R. 251) with reference to the fire at Fort Scott, without disclosing that the same conditions prevailed at Fort Scott which prevailed at Marysville.

To this testimony the following objections were made, and the following ruling of the Master:

> "Mr. Evans: We object as being incompetent, irrelevant and immaterial, and not tending to prove or disprove any issues in this case.
>
> "The Master: Overruled.
>
> "Mr. Doran: Exception. We make the same objection for all the reasons heretofore stated.

"The Master: The testimony will be received subject to the objection.

"Mr. Evans: And with the same understanding.

"A. Yes."

After the foregoing objections were overruled, the witness was permitted to testify at length (R. 251, 254). The petitioners thereupon made the following objection, and the Master made the following rulings (R. 253, 254):

"Mr. Doran The plaintiff, the Sinclair Oil Company, separately objects to each separate question and the answer made thereto by the witness as incompetent and improper to prove or disprove any issue in this case, in that the character of the tanks as to their safety, and whether they come within the police power of the City of Marysville, I mean the tanks located at Marysville, can't be proved by individual instances of fire in other places, and particularly there is no evidence to show that the physical conditions or character of construction of the tanks and the equipment or the method by which they were managed and operated is the same as or similar to those at Marysville; that is, there is no evidence to show that the Fort Scott tanks were the same as the Marysville tanks, and the plaintiff for all reasons stated, now moves the court to strike out any questions and answers of the witness relative to this fire.

"Mr. Evans: The Standard makes the same objection.

"The Master: Overruled at the present. The testimony will be received subject to the objection.

"Q. As part of the witness' direct examination, we offer defendants' Exhibits 5 and F heretofore marked for the purpose of identification.

"Mr. Evans: Our objections lie also to the exhibits?"

"The Master: Yes."

Mr. Wehner, a witness called on behalf of the respondents, testified with reference to the fire at Hays, Kansas. Petitioners made the following objections and the Master made the following rulings (R. 256, 257):

"Mr. Doran: The plaintiff, the Sinclair Oil Company, objects to any inquiry relative to any fire, for all the reasons heretofore assigned to this character of the testimony, as incompetent to prove or disprove any issue in this case, and all those objections heretofore that have been made to testimony of this kind are renewed.

"Mr. Evans: The Standard makes the same objection.

"The Master: Same ruling.

. . . . . .

"Mr. Doran: We would like to have the record show that the objections made to this evidence stand to each question without repetition."

. . . . . .

"Mr. Doran: The plaintiffs renew their objection to each and every question and answer relative to this fire and ask that it be stricken out.

"Mr. Evans: The Standard makes the same objection.

"Mr. Doran: I included the Standard in my objection.

"The Master: The same ruling."

James Joseph Love, a witness called on behalf of the respondents, testified (R. 261-267) with reference to the fire at Hays. To his testimony the petitioners made the following objection, and the Master made the following ruling (R. 262, 263):

"Mr. Doran: The plaintiffs, each for itself, object to all questions that may be asked relative to the alleged fire at Hays, as incompetent to prove or disprove any issue in this case, in that the circumstances surrounding this fire were not the same as those prevailing in Marysville. The fire in the tanks—the tanks are not the same as those at Marysville, that there is nothing to show that the physical facts, equipment, manner of operation of the Marysville tanks and the manner of operation and maintenance of them is similar or the same as the conditions prevailing at the time of the fire at Hays. For all of these reasons, this evidence is incompetent to prove the character of the tanks or manner of operation, now located in Marysville."

"The Master: Overruled for the present; the testimony is received subject to the objection."

"Mr. Doran: Exception."

It will be seen from the foregoing objections, and the rulings of the Master thereon, that all testimony relative to other fires was admitted over the objections of your petitioners, for the reasons which are fully stated in the objections, and such testimony having been erroneously admitted over the objections of your petitioners, and Finding No. LXXXI having been based on such testimony, was erroneously approved. Your petitioners filed exceptions to the Special Master's said finding, which exceptions are set out in full, (R. pp. 82-86).

The exceptions so made by your petitioners were by the trial court denied and overruled; to which ruling of the court your petitioners duly excepted (R. 89).

CONCLUSION.

For all the reasons stated under the specifications of error set out above, we respectfully submit that the Eighth Circuit Court of Appeals committed reversible error:

1. In reversing the judgment of the United States District Court for the District of Kansas.

2. Erred in repudiating and nullifying the report and findings of the Special Master (which were approved by the trial court), made on conflicting evidence, and which by the Circuit Court of Appeals must be deemed to be presumptively correct.

3. In denying appellees' (petitioners) petition for rehearing.

For all the reasons stated in this brief, we earnestly pray that the decree of the Circuit Court of Appeals be reversed, and that the decree of the District Court for the District of Kansas be affirmed.

Respectfully submitted.

EARLE W. EVANS,

THOMAS F. DORAN,

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